

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

C.P., Appellant)	
)	
and)	Docket No. 10-589
)	Issued: September 16, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Bayshore, NY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 30, 2009 appellant, through her attorney, filed a timely appeal from a November 25, 2009 merit decision of the Office of Workers' Compensation Programs terminating her compensation and authorization for medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective June 6, 2009 on the grounds that she had no further disability due to her December 14, 2007 employment injury; and (2) whether the Office properly terminated her authorization for medical benefits.

FACTUAL HISTORY

On December 27, 2007 appellant, then a 45-year-old carrier, filed a claim alleging that on December 14, 2007 she injured her knees when she slipped and fell on ice delivering mail. She stopped work on December 17, 2007. The Office accepted the claim for unspecified bilateral internal derangement of the knees and paid appellant compensation for total disability beginning

January 30, 2008. On July 17, 2008 appellant underwent a right knee arthroscopy with a medial and lateral meniscectomy and meniscal shaving.

On September 22, 2008 the Office referred appellant to Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, for a second opinion examination. In an October 10, 2008 progress report, Dr. Christopher Durant, an attending Board-certified orthopedic surgeon, diagnosed status post right knee arthroscopic surgery and right knee chondral defects. He opined that appellant was disabled from employment and referred her for physical therapy.

In a report dated October 16, 2008, Dr. Wert opined that appellant was unable to return to her regular employment “due to a combination of preexisting degenerative osteoarthritis, prior right knee injury and the work-related injury on December 14, 2007.” He stated, “I do not feel that [she] can be expected to resume her regular job duties and perform the tasks of her regular employment.” In an accompanying work restriction evaluation, Dr. Wert found that appellant could walk and stand two hours per day. He did not indicate that she was capable of any employment.

On January 22, 2009 the Office referred appellant to Dr. Bradley White, a Board-certified orthopedic surgeon, for an impartial medical examination. It noted that a conflict in medical opinion existed between Dr. Durant and Dr. Wert regarding whether she had any continuing employment-related disability.

On February 28, 2009 Dr. White reviewed the history of injury and the medical evidence of record. On physical examination, he found “clinical evidence of early varus deformity bilaterally” with “significant crepitus palpable throughout range of motion of both knees.” Dr. White found no evidence of muscle wasting in the knees and full quadriceps strength with no instability. He diagnosed bilateral knee contusions/sprains causing a temporary aggravation of preexisting osteoarthritis of the bilateral knees. Dr. White advised, “In terms of causality only the now resolved temporary aggravation of preexisting bilateral knee arthritis is causally related. The underlying and preexisting knee arthritis is degenerative in nature and not causally related.” In an accompanying work restriction evaluation, Dr. White listed permanent work restrictions.

By letter dated March 18, 2009, the Office requested that Dr. White clarify whether the work restrictions were due to the December 14, 2007 work injury and whether appellant had any residuals of her accepted condition of a temporary aggravation of preexisting bilateral knee arthritis. On March 31, 2009 Dr. White responded that her temporary aggravation had resolved and that her permanent restrictions were not due to her accepted work injury.

On April 23, 2009 the Office notified appellant of its proposed termination of her compensation and authorization for medical treatment as the medical evidence established that she had no residuals of her accepted employment injury. On May 6, 2009 appellant challenged the proposed termination of her compensation and asserted that Dr. White was biased against her.

In a progress report dated May 11, 2009, Dr. Durant diagnosed multiple chondral defects of the right knee and left knee arthritis. He opined that appellant remained totally disabled.

By decision dated May 29, 2009, the Office terminated appellant’s compensation and authorization for medical benefits effective June 6, 2009. It determined that the opinion of

Dr. White, the impartial medical examiner, constituted the weight of the evidence and established that she had no further work-related disability or condition.

On June 8, 2009 appellant, through her attorney, requested a telephone hearing. A telephone hearing was held on September 8, 2009. By decision dated November 25, 2009, the hearing representative affirmed the May 29, 2009 termination decision.

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.¹ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² 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.³

ANALYSIS

The Office accepted appellant's claim for bilateral internal derangement of the knees. Dr. Durant, her attending physician, diagnosed status right knee arthroscopic surgery and right knee chondral defects. He found that appellant remained disabled from employment. Dr. Wert, the Office referral physician, opined that she was unable to return to her usual employment due in part to her December 14, 2007 employment injury. The Office determined that the record contained a conflict in medical opinion between Dr. Durant and Dr. Wert on the issue of whether appellant had any continuing employment-related disability. It referred her to Dr. White for resolution of the conflict and terminated her compensation after finding that his opinion constituted the weight of the evidence due to his status as the impartial medical examiner. The Board finds, however, that the record did not contain a conflict in medical opinion at the time of the Office's referral of appellant to Dr. White for an impartial medical examination. Both Dr. Durant and Dr. Wert found that appellant was unable to work due at least in part to her accepted employment injury. As the record did not contain an opinion from an Office referral physician that her disability due to her employment-related bilateral internal derangement of the knees had ceased, there was no conflict in medical opinion at the time the Office referred her to Dr. White.⁴ Consequently, the Board finds that Dr. White is an Office referral physician rather than an impartial medical examiner.

On February 28, 2009 Dr. White listed findings of crepitus with range of motion of the knees and an early varus deformity bilaterally. He diagnosed bilateral knee contusions and sprains resulting in a temporary aggravation of preexisting osteoarthritis. Dr. White asserted that appellant's temporary aggravation had resolved and that her condition was due to preexisting knee arthritis. He found that she was unable to return to her regular employment due to her

¹ *T.F.*, 58 ECAB 128 (2006); *George A. Rodriguez*, 57 ECAB 224 (2005).

² *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ A conflict in medical opinion exists when there are opposing reports of virtually equal weight and rationale between a physician making the examination for the United States and a physician of the employee. See 5 U.S.C. § 8123; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

preexisting condition. In response to a request from the Office for clarification, Dr. White advised that appellant's temporary aggravation of preexisting bilateral arthritis of the knees had resolved and that she had no restrictions due to her work injury.

The Board finds that the record contains an unresolved conflict in medical opinion between Dr. White and Dr. Durant regarding whether appellant has any further disability and need for medical treatment resulting from her accepted employment injury of an unspecified bilateral internal derangement of the knees. Accordingly, the Office did not meet its burden of proof to terminate her compensation benefits.⁵

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation and authorization for medical treatment effective June 6, 2009 on the grounds that she had no further disability due to her December 14, 2007 employment injury

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 25, 2009 is reversed.

Issued: September 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁵ See *Joseph Roman*, 55 ECAB 223 (2004).