

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

N.K., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Elyria, OH, Employer

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**Docket No. 10-2214
Issued: August 22, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 30, 2010 appellant, through counsel, filed a timely appeal from July 8 and March 18, 2010 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's authorization for medical benefits for her right knee anterior cruciate ligament tear effective March 18, 2010.

FACTUAL HISTORY

On September 10, 2007 appellant, then a 43-year-old city carrier, filed a traumatic injury claim alleging that on August 31, 2007 she injured her left knee when she tripped while going

¹ 5 U.S.C. § 8101 *et seq.*

down a short step.² OWCP accepted the claim for right knee contusion, sprain and abrasion, which was subsequently expanded to include a right knee anterior cruciate ligament tear. It authorized arthroscopic surgery, which occurred on March 28, 2008. Appellant stopped work on January 28, 2008 and returned to work with restrictions on June 30, 2008.³

On December 5, 2008 Dr. Karl V. Metz, a second opinion Board-certified orthopedic surgeon, diagnosed right knee contusion, sprain, abrasion and anterior cruciate ligament tear, which were employment related and nonemployment related conditions of right knee degenerative joint disease and chondromalacia patella. A physical examination of the right knee revealed 95 degrees flexion with no flexion contracture, no definite effusion, no varus valgus deformity, no patellar tenderness and no crepitation with very guarded right leg range of motion. Dr. Metz opined that the accepted conditions of right knee contusion, abrasion and sprain had healed. He stated that appellant continued to have residuals of the work injury due to right thigh and calf muscle atrophy and guarded right knee range of motion.

In an April 15, 2009 addendum, Dr. Metz opined that appellant's nonwork related mild right knee degenerative arthritis and patella chondromalacia were unaffected by the August 31, 2007 employment injury. He concluded that the record contained no postoperative x-ray or magnetic resonance imaging (MRI) scan supporting a worsening or aggravation of appellant's nonwork conditions of patella chondromalacia and degenerative arthritis.

In a May 6, 2009 report, Dr. William R. Bohl, a Board-certified orthopedic surgeon and appellant's attending physician, reviewed Dr. Metz's March 15, 2009 addendum and concurred that the conditions of right knee contusion, abrasion and sprain had resolved. However, he opined that appellant's residual thigh muscle atrophy had been aggravated by the patella malalignment and patellofemoral arthritis. Dr. Bohl concluded that she sustained a substantial aggravation of her preexisting patella chondromalacia due to her employment injury based on the fact that her conditions became symptomatic. He opined that aggravation of appellant's preexisting patella chondromalacia should be included in her accepted conditions.

On July 24, 2009 OWCP determined there was a conflict in the medical opinion evidence between Drs. Metz and Bohl with respect to the extent of appellant's work injury and referred her to Dr. Alan Wilde, a Board-certified orthopedic surgeon, for resolution of this conflict. In an August 4, 2009 report, Dr. Wilde diagnosed right knee degenerative joint and patella chondromalacia, which were not work related. Based upon a review of the medical record, statement of accepted facts and physical examination, he concluded that appellant's accepted conditions of right knee contusion, abrasion and sprain had resolved and that the accepted right knee cruciate ligament had been treated surgically. Dr. Wilde opined that she required no further medical treatment for her accepted work conditions of right knee abrasion, sprain, contusion and anterior cruciate ligament tear.

² OWCP assigned claim File No. xxxxxx541.

³ Claim File No. xxxxxx939 and File No. xxxxxx504 were accepted for a right elbow condition and bilateral carpal tunnel syndrome. On March 16, 2009 OWCP combined claim File Nos. xxxxxx541, xxxxxx639 and xxxxxx504 to prevent further confusion.

On November 19, 2009 OWCP referred appellant to Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Drs. Metz and Wilde regarding whether she continued to suffer residuals from her accepted right knee employment injuries. In a December 8, 2009 report, Dr. Kovach, based upon a review of the medical evidence and statement of accepted facts and physical examination, concluded that appellant's accepted employment injuries had resolved. He identified the accepted employment conditions as right knee contusion, abrasion, sprain and anterior cruciate ligament tear. Dr. Kovach reported that a physical examination of the right knee showed 100 degrees flexion, 0 degrees extension, one centimeter of right thigh atrophy and bilateral knee moderate crepitation on flexion and extension. A review of a November 12, 2009 MRI scan showed no visible anterior cruciate ligament tear and no tearing of the menisci. Dr. Kovach stated that appellant's anterior cruciate ligament was stable and functioning "in spite of the recent MRI [scan] studies stating that the anterior cruciate ligament is probably torn." In support of his conclusion that her accepted employment conditions had resolved, he noted that the right knee anterior cruciate tear had been surgically treated and she "has returned to the baseline conditions that existed prior to her work injury."

On February 10, 2010 OWCP advised appellant of its intent to terminate her medical benefits based on Dr. Kovach's December 8, 2009 report. It instructed her to submit any evidence or argument to OWCP within 30 days of the date of the notice, if she disagreed with the proposed termination.

In a February 25, 2010 report, Dr. Bohl opined that appellant continued to suffer from right patella chondromalacia which had been aggravated by her employment injury. He noted that she had no symptoms prior to the injury and that "[c]hondromalacia patella is normally made more symptomatic either by blow to the anterior patella" or knee condition or injury causing "atrophy of the thigh musculature."

By decision dated March 18, 2010, OWCP terminated appellant's compensation and medical benefits effective that day.

In a March 21, 2010 letter, appellant's attorney requested a telephonic hearing before OWCP's hearing representative, which was held on June 1, 2010.

In a June 21, 2010 report, Dr. Bohl diagnosed right knee post-traumatic arthritis due to appellant's accepted employment injury. A physical examination revealed bilateral knee tenderness over the patellar facets, a negative anterior drawer, 125 degrees motion, a negative McMurray's sign and one inch of atrophy in the right thigh.

By decision dated July 8, 2010, OWCP's hearing representative affirmed the termination of appellant's medical benefits.⁴

⁴ The Board notes that, following the July 8, 2010 OWCP hearing representative's decision, OWCP received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003); *M.B.*, Docket No. 09-176 (issued September 23, 2009).

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

Section 8123(a) of FECA provides in pertinent part: "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."⁸ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁹

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹⁰

ANALYSIS

OWCP accepted right knee sprain, abrasion, anterior cruciate ligament tear as a result of the August 31, 2007 employment injury. By decision dated March 18, 2010 it terminated appellant's medical benefits effective that day based on Dr. Kovach's December 8, 2009 report, which was affirmed by OWCP's hearing representative on July 8, 2010. The issue to be resolved is whether OWCP met its burden of proof to terminate appellant's medical benefits for treatment of her right knee anterior cruciate ligament tear. The Board finds that OWCP failed to meet its burden.

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁷ *Kathryn E. Demarsh*, *supra* note 6; *James F. Weikel*, 54 ECAB 660 (2003); *B.K.*, Docket No. 08-2002 (issued June 16, 2009).

⁸ 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB 382 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁹ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹⁰ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(e) (September 2010).

OWCP initially referred appellant to Dr. Wilde to resolve the conflict in the medical opinion evidence between Dr. Metz, OWCP's referral physician, and Dr. Bohl, her attending physician, on the extent of her work injury. At the time of the referral Dr. Metz opined that appellant continued to have residuals of her accepted employment injury but her preexisting right knee patella chondromalacia and degenerative arthritis had not been aggravated by her injury. Dr. Bohl and Dr. Metz agreed that the accepted conditions of right knee sprain and abrasion had resolved. In an August 4, 2009 report, Dr. Wilde concluded that appellant required no further medical treatment for accepted work conditions of right knee sprain, abrasion, anterior cruciate ligament tear. OWCP then found a new conflict in the medical opinion evidence as to whether appellant continued to suffer from residuals of her accepted employment injury and referred her to Dr. Kovach for resolution of the conflict. The Board notes that at the time of the referral to Dr. Kovach, it identified the conflict as between Drs. Wilde and Metz, the initial impartial medical examiner and the second opinion specialist, respectively. However, a conflict under section 8123 cannot exist unless there is a conflict between an attending physician and OWCP's physician.¹¹ At the time of OWCP's referral to Dr. Kovach, there was a conflict in the medical opinion evidence as to whether appellant continued to have residuals from her accepted employment injury, but it was between Drs. Metz and Bohl.

As noted above, Board precedent provides that when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, should OWCP refer the claimant to a second impartial specialist.¹²

Rather than obtaining clarification of Dr. Wilde's opinion, OWCP found a new conflict in the medical opinion evidence existed between Drs. Wilde and Bohl and referred appellant to Dr. Kovach to resolve this conflict. It did not explain basis for why it found Dr. Wilde's report insufficient to resolve the conflict in the medical opinion evidence or why it did not seek a supplemental report from him.

The Board finds that OWCP failed to undertake proper development of the medical evidence. OWCP erred by not requesting that Dr. Wilde provide a supplemental report to clarify his opinion on whether appellant continued to have residuals from her accepted employment injury. It offered no basis in the record for finding that clarification from Dr. Wilde was unnecessary.

Under Board precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required under specific circumstances. In *Joseph R. Alsing*,¹³ the

¹¹ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹² *Nancy Keenan*, 56 ECAB 687 (2005); *Guiseppe Aversa*, 55 ECAB 164 (2003); *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

¹³ 39 ECAB 1012 (1988). See also *Nancy Keenan*, *supra* note 12; *Jeannine E. Swanson*, 45 ECAB 325 (1994).

Board excluded the medical report from a second impartial medical specialist, which was obtained prior to any attempt to have the original medical referee clarify his medical opinion. The Board stated: “Since the report was improperly obtained, it will not be given any weight on review by the Board and should not be considered by [OWCP].” OWCP procedures also direct exclusion of a report where a second referee specialist’s report is requested before it has attempted to clarify the original referee specialist’s report.¹⁴ Consequently, the Board finds that Dr. Kovach’s report should be excluded from consideration as OWCP did not follow its procedures when it failed to seek clarification from Dr. Wilde.¹⁵ For this reason, the Board finds that OWCP did not meet its burden of proof to terminate appellant’s medical benefits.¹⁶

CONCLUSION

The Board finds that OWCP has not met its burden of proof in terminating appellant’s medical benefits effective March 18, 2010.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Exclusion of Medical Evidence*, Chapter 2.810.12(a)(2) (September 2010) and Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6(b) (September 1995).

¹⁵ *Id.*

¹⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 8 and March 18, 2010 are reversed.

Issued: August 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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