

FACTUAL HISTORY

On December 7, 2006 appellant, then a 47-year-old field supervisor, filed a traumatic injury claim alleging that on that day he injured his right knee in the performance of duty. OWCP accepted the claim for right knee contusion and paid wage-loss compensation for total disability.

In a January 3, 2007 attending physician's report (Form CA-20), Dr. Arthur J. Ting, an attending Board-certified orthopedic surgeon, diagnosed tricompartmental chondral degeneration and lateral meniscal tear. He checked "yes" to the question as to whether the diagnosed condition was employment related. Under the section for rationale, Dr. Ting attributed the diagnosed conditions to the December 7, 2006 employment injury since appellant had no symptoms prior to the employment injury. Physical findings included 10 to 120 degrees range of motion, positive crepitation, positive effusion, positive McMurray's test and tender anterior cruciate ligament with laxity. Dates of treatment were noted as December 19 and 28, 2006. Dr. Ting indicated that appellant continued to be totally disabled.

On February 6, 2007 Dr. Ting opined that appellant sustained an employment injury on December 7, 2006² resulting in an acute right knee effusion with possible internal derangement. He reported that appellant previously injured his right knee while playing football in 1977, which required surgery, and has worked at the employing establishment with no restrictions for his right knee. Dr. Ting opined that there were degenerative changes to the right knee as a result of repetitive trauma.

OWCP referred appellant for a second opinion evaluation to determine the nature and extent of the injury or injuries sustained as a result of the December 7, 2006 employment injury. In an April 9, 2007 report, Dr. Aubrey A. Swartz, a second opinion Board-certified orthopedic surgeon, conducted a physical examination and reviewed the statement of accepted facts, history of the injury and medical evidence. Appellant related that he had no problems with his knee prior to the December 7, 2006 employment injury and that he had been off work since December 28, 2006. A physical examination of the right knee revealed that it was four centimeters larger in circumference than the left knee; there was no temperature change or warmth over the right knee; right knee medial tenderness; trace right knee laxity and no right knee discoloration. Dr. Swartz found 15 degrees extension and 100 degrees flexion right knee range of motion. He reviewed December 26, 2006 magnetic resonance imaging (MRI) scan, which revealed evidence of a previous meniscectomy and arthritis. Dr. Swartz diagnosed right knee degenerative menisci, tricompartmental degenerative arthritis, attenuation and scarring of the anterior cruciate ligament, which were due to preexisting pathology and prior injuries. He found that the December 7, 2006 injury caused a temporary aggravation of appellant's preexisting right knee degenerative conditions and that any aggravation had ceased by April 7, 2007. In concluding, Dr. Swartz opined that appellant had no residuals or disability due to his accepted December 7, 2006 employment injury.

² Dr. Ting noted the date as "December 27, 2006" which appears to be a typographical error.

On April 23, 2007 Dr. Ting opined that appellant sustained an internal derangement of his right knee as a result of the December 7, 2006 employment injury and his continued working even in a modified job. Right knee diagnoses included patellofemoral and medial compartment chondromalacia, internal derangement, meniscal tears, chondral lesions and persistent synovitis associated with swelling. Dr. Ting opined that appellant's work activities "caused [an] aggravation of the original injury and caused constant pain and discomfort from December 28, 2006 to the current date."

In a June 1, 2007 report, Dr. Ting attributed appellant's right knee degenerative changes to the repetitive trauma sustained while working at the employing establishment for approximately 20 years.

On November 27, 2007 OWCP referred appellant to Dr. D. Santi Rao, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Ting and Swartz on the issue of whether appellant continued to have any disability or residuals as a result of the accepted December 7, 2006 employment injury.

In a December 31, 2007 report, Dr. Rao, based upon a review of the statement of accepted facts, medical evidence and physical examination, diagnosed an employment-related right knee sprain/contusion and nonemployment-related right knee three compartment osteoarthritis. He noted that the medical history included a 1987 motorcycle accident and 1976 sports injury including right knee swelling and infection in addition to the 2007 employment injury. A physical examination revealed no effusion, neutral alignment, patellofemoral crepitus, limited extension and flexion range of motion, "mediocre and latter and posterior tenderness" and a healed anteromedial right knee surgical scar. A review of a December 17, 2007 x-ray interpretation revealed severe osteoarthritic changes. Dr. Rao opined that the December 7, 2006 employment injury had merely exacerbated appellant's preexisting right knee osteoarthritis which resulted in pain and a right knee sprain. However, the injury caused no permanent aggravation or damage as a review of the medical evidence revealed no evidence of any fracture, dislocation or an internal derangement. Following the employment injury appellant continued to work his regular job as well as working overtime. Dr. Rao opined that the onset of symptoms following the December 7, 2006 employment injury is compatible with appellant's preexisting degenerative osteoarthritis and long-standing range of motion restriction. He opined that the preexisting right knee degenerative changes are unrelated to the December 7, 2006 employment injury, but are attributable to the 1976 right knee injury and subsequent surgery with reported infection and treatment. Dr. Rao concluded that appellant no longer had any residuals or disability due to his accepted right knee contusion and any disability was attributable to the preexisting right knee degenerative condition.

On June 11, 2008 OWCP issued a notice proposing to terminate appellant's compensation benefits based upon the report of Dr. Rao, the impartial medical specialist.

In a letter dated July 1, 2008, appellant disagreed with OWCP's proposal to terminate his compensation benefits. He noted that prior to the December 7, 2006 employment injury he had no disability or symptoms in his right knee. In support of his contention that his condition had not resolved, appellant submitted progress notes for the period May 9 through June 20, 2008

from Dr. Ting reporting worsening right knee pain along with physical findings of tenderness and crepitation.

By decision dated July 25, 2008, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day.

Appellant requested an oral hearing before OWCP's hearing representative, which was held on January 21, 2009. At the hearing, he had representation, provided testimony and submitted evidence including a September 30, 2008 report from Dr. Joseph R. Meyers, an examining Board-certified orthopedic surgeon.

Dr. Ting, in an August 14, 2008 progress note, diagnosed right knee chondromalacia and indicated that appellant was totally disabled from working. He reported that appellant continued to have pain, effusion and right knee swelling and had limited range of motion.

On September 30, 2008 Dr. Joseph R. Meyers, an examining Board-certified orthopedic surgeon, provided a medical and work history, findings on examination and review of medical records. He noted his disagreement with the opinions of Drs. Schwartz and Rao that no longer had any residuals or disability from the accepted December 7, 2006 employment injury. According to Dr. Meyers, neither physician gave any credibility to appellant's past medical history or employment history which contained no evidence of any right knee symptomatology prior to the December 7, 2006 employment injury when reaching their conclusion that any aggravation or disability had ceased. He opined that appellant remained totally and temporarily disabled due to his accepted December 7, 2006 employment injury.

In March 26, 2009 progress notes, Dr. Ting diagnosed chondromalacia. He reported right knee effusion and locking and that appellant remained off work.

By decision dated July 30, 2009, OWCP's hearing representative affirmed the July 25, 2008 decision terminating his compensation benefits.

On May 14, 2010 appellant requested reconsideration. In support of his request, he submitted a March 8, 2010 operative report from Dr. Ting, who noted preoperative diagnoses of right olecranon bursitis and right knee degenerative joint disease and postoperative diagnoses included chondromalacia, olecranon bursectomy and medial and lateral menisectomies. Dr. Ting also provided a description of the surgery performed.

By merit decision dated July 7, 2010, OWCP denied modification.³ It found the evidence submitted by appellant insufficient to establish that he continued to have any disability or residuals as a result of his accepted December 7, 2006 employment injury.

³ The Board notes that appellant submitted new evidence in his appeal to the Board. The Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *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 -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ 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.⁸

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.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right knee contusion as a result of the December 7, 2006 employment injury. Wage-loss compensation was authorized and paid for the period February 11 to December 7, 2007. On June 24, 2008 OWCP terminated appellant's compensation benefits effective that day based on the opinion of the impartial medical examiner, Dr. Rao, which OWCP's hearing representative affirmed. The issue to be determined is whether OWCP met its burden to terminate appellant's compensation benefits.

OWCP referred appellant to Dr. Rao to resolve the conflict in the medical opinion evidence between Drs. Schwartz and Ting. Dr. Ting, appellant's treating physician, opined that appellant continued to suffer from residuals from his accepted December 7, 2006 employment injury. Dr. Schwartz, an Office referral physician, disagreed with Dr. Ting and opined that appellant no longer had any residuals or disability due to the accepted employment injury. The

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *Kathryn E. Demarsh*, *supra* note 7; *James F. Weikel*, 54 ECAB 660 (2003).

⁹ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁰ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

Board notes that there was a conflict of medical opinion evidence between appellant's physician and OWCP's referral physician on the issues of medical residuals and disability. The Board finds that OWCP properly referred appellant to Dr. Rao to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

On December 31, 2007 Dr. Rao, based upon a physical examination, statement of accepted and review of the medical and factual histories, concluded that appellant no longer had any residuals from his accepted employment injury. In concluding that appellant only sustained a temporary aggravation of a preexisting degenerative condition, he noted that there was no evidence of any fracture, dislocation or an internal derangement and appellant continued to work, including working overtime, following the December 7, 2006 employment injury. Based on the medical and factual evidence and physical examination, Dr. Rao concluded that appellant only sustained a temporary aggravation of a preexisting right knee degenerative condition which resulted in a right knee sprain/contusion which ceased by April 7, 2007. Thus, Dr. Rao opined that appellant's current condition and disability were due to his preexisting right knee degenerative condition and the effects of his nonemployment-related 1976 sports injury.

The Board finds that, under the circumstances of this case, the impartial medical opinion of Dr. Rao is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related right knee contusion has ceased. Therefore, OWCP properly accorded Dr. Rao's opinion as the special weight of a referee physician.¹¹

At the oral hearing appellant submitted a September 30, 2008 report from Dr. Meyers. In his report, Dr. Meyers noted his disagreement with the reports of Drs. Schwartz and Rao that appellant no longer had any disability or residuals as a result of the December 7, 2006 employment injury. He opined that appellant continued to have residuals and disability as he had no right knee symptomatology prior to the December 7, 2006 employment injury. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to support a causal relationship.¹² Thus, the opinion of Dr. Meyers is insufficient to create a conflict with the opinion of Dr. Rao.

The Board finds that Dr. Rao had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Rao is a specialist in the appropriate field. At the time benefits were terminated he clearly opined that appellant had no work-related reason for disability. Dr. Rao's opinion as set forth in his report of December 30, 2007 is found to be probative evidence and reliable. The Board finds that his opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted condition of right knee contusion had ceased.

¹¹ *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹² *Michael S. Mina*, 57 ECAB 379 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had any disability causally related to his accepted injury.¹³

ANALYSIS -- ISSUE 2

Appellant submitted a March 8, 2010 operative by Dr. Ting, who provided preoperative and postoperative diagnoses in this report as well as a description of the surgery performed. The Board notes that Dr. Ting was on one side of the conflict which was resolved by Dr. Rao. The March 8, 2010 operative report contains no opinion as to the cause of the conditions diagnosed by Dr. Ting or whether appellant continues to have residuals from the accepted condition which helped to create the conflict. Thus, this report would be insufficient to give rise to a new conflict or otherwise show that the termination was improper.¹⁴ Accordingly, the Board finds that Dr. Rao's opinion continues to constitute the special weight of medical opinion and supports OWCP's July 25, 2008 decision terminating appellant's compensation and denying any entitlement to continuing disability based on the accepted condition of right knee contusion.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits effective July 25, 2008 on the grounds that he no longer had any residuals or disability causally related to his accepted right knee contusion. The Board also finds that he has failed to establish that he had any continuing employment-related residuals or disability after July 25, 2008 causally related to his accepted December 7, 2006 employment injury.

¹³ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁴ *M.S.*, 58 ECAB 328 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2010 is affirmed.

Issued: December 13, 2011
Washington, DC

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

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

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