

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

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**T.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
New Orleans, LA, Employer.**

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**Docket No. 11-2033  
Issued: September 21, 2012**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 13, 2011 appellant, through his attorney, filed a timely appeal of an August 12, 2011 decision of the Office of Workers' Compensation Programs (OWCP) denying modification of its decision terminating benefits and denying continuing compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP properly terminated appellant's compensation and medical benefits effective July 18, 2006 on the grounds that his accepted condition had resolved; and (2) whether appellant met his burden of proof to establish that he had any disability or condition after July 18, 2006 causally related to the accepted employment injury.

On appeal appellant, through counsel, contends that OWCP's decision is contrary to fact and law.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decisions are hereby incorporated by reference. The relevant facts are set forth.<sup>2</sup>

OWCP accepted that on January 7, 1983 appellant, then a 34-year-old clerk, sustained a right knee contusion and synovitis, meniscus tear and permanent aggravation of degenerative disease of the right knee; OWCP File No. xxxxxx245. It also accepted appellant's claim for a March 5, 1984 injury for cervical sprain/strain, right shoulder contusion, lumbosacral strain and lumbar herniated nucleus pulposus; OWCP File No. xxxxxx710. OWCP combined the cases under the File No. xxxxxx245.

On July 18, 2006 OWCP terminated appellant's wage-loss compensation and medical benefits finding that the weight of the medical evidence established that the injury-related conditions had resolved. It noted that a conflict in medical opinion arose between appellant's treating physicians and the second opinion physician, Dr. Martyn A. Goldman, a Board-certified orthopedic surgeon. OWCP referred appellant to an impartial medical examiner, Dr. Stanley William Collis, a Board-certified orthopedic surgeon, who determined that appellant's employment-related conditions had resolved. In the Board's decision of December 19, 2008,<sup>3</sup> the Board affirmed OWCP's termination of medical and compensation benefits effective July 18, 2006. The Board further found that appellant had not met his burden of proof to establish that he had any continuing disability after July 18, 2006.

On December 21, 2006 appellant underwent a right total knee replacement.

On June 19, 2007 OWCP denied modification of its prior decision.

In an August 13, 2007 report, Dr. Stacie L. Grossfeld, a Board-certified orthopedic surgeon, stated that appellant was a patient of hers who had a history of work-related injuries in 1983 and 1984 that resulted in end-stage osteoarthritis, which resulted in knee replacement surgery. She opined that this was directly related to his work-related injuries and his current condition. Dr. Grossfeld concluded that appellant was unable to currently work and was totally disabled.

On September 7, 2007 OWCP denied appellant's request for reconsideration without merit review.

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<sup>2</sup> See Docket No. 06-1869 (issued March 17, 2006). The Board found that OWCP's decision denying appellant's request for reconsideration of the denial of his emotional condition or injuries to his jaw and ankle was untimely filed and failed to demonstrate clear evidence of error. Docket No. 03-1382 (issued November 28, 2003) (*Order Dismissing Appeal*) as identical issues were addressed by the Board in Docket No. 03-1276; Docket No. 03-1276 (issued October 23, 2003). The Board found that appellant had not established that he sustained injuries to his jaw and ankle or an emotional condition causally related to the accepted injuries. Further, the Board affirmed OWCP's decision denying reconsideration. Docket No. 00-2068 (issued June 3, 2002). The Board remanded the case for OWCP to consider appellant's request for reconsideration as it was timely filed.

<sup>3</sup> Docket No. 08-780 (issued December 19, 2008).

In a September 28, 2007 report, Dr. George H. Raque, a Board-certified neurologist, stated that appellant had been followed in his office for neck problems related to an old work injury, for which he recently underwent cervical discectomy and fusion. He stated that, while it appeared that appellant was doing well postoperatively, he could not go back to work because of the recent surgery and knee problems. Dr. Raque noted that appellant was disabled from work and would remain so for the foreseeable future.

In a decision dated December 20, 2007, OWCP determined that the evidence submitted was insufficient to warrant a merit review of the June 19, 2007 decision.

By decision dated December 19, 2008, the Board found that OWCP met its burden of proof to terminate appellant's compensation and medical benefits effective July 18, 2006. The Board also found that appellant had not met his burden of proof to establish that he had any continuing employment-related medical condition or disability after July 18, 2006. The Board further found that OWCP properly denied appellant's requests for further merit review of the claim.<sup>4</sup>

By letter dated January 12, 2010, appellant, through his attorney, requested reconsideration. OWCP, in a decision dated March 24, 2010, denied appellant's request for reconsideration as it was not timely filed and failed to establish clear evidence of error.

In a decision dated April 26, 2011, this Board found that appellant had established clear evidence of error as the statement of accepted facts was defective. OWCP failed to inform the second opinion physician, Dr. Goldman, and the impartial medical examiner, Dr. Collis, that appellant's claim had been accepted for permanent aggravation of degenerative joint disease of the right knee. Accordingly, the Board remanded the case for further merit review.<sup>5</sup>

On remand, appellant submitted an October 12, 2009 progress report by Dr. Raymond G. Shea, a Board-certified orthopedic surgeon, who noted that appellant was still in pain and had discomfort in his knees from the workers' compensation injury. Dr. Shea noted that, when appellant fell, he injured both his knees and neck, which progressed to severe degenerative changes requiring total knee replacements. Appellant also submitted reports related to his cardiac condition and others previously of record.

On May 19, 2011 OWCP referred appellant to Dr. Nino R. Lentini, a Board-certified orthopedic surgeon, for a second opinion. In the new statement of accepted facts, it specifically included the accepted conditions for both the 1983 and 1984 employment injuries, which included permanent aggravation of degenerative joint disease, right knee, the condition initially omitted. In a June 13, 2011 report, Dr. Lentini opined that the aggravation of appellant's degenerative joint disease in his right knee had resolved. He noted that appellant had a well-healed right knee replacement and that he is pain free and stable. Dr. Lentini opined that any remaining conditions were due to the natural aging process and appellant's excessive weight. He opined that appellant could not return to work at his regular-duty position as a distribution clerk

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<sup>4</sup> Docket No. 08-780 (issued December 19, 2008).

<sup>5</sup> Docket No. 10-1362 (issued April 26, 2011).

with the employing establishment because of his weight, his knee replacement and his neck surgery all operate to limit his ability to lift, bend, twist, climb, stoop, squat, crouch and limit his endurance, although he did believe that appellant could return to work in a sit-down position. OWCP asked for clarification, and in a July 8, 2011 report, Dr. Lentini noted that the accepted work conditions had resolved and no longer exist and that the only remaining conditions were not due to work injuries but rather due to his excessive weight and the natural aging process.

By decision dated August 12, 2011, OWCP denied modification of its prior decisions.

### **LEGAL PRECEDENT**

Once OWCP 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.<sup>6</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.<sup>8</sup>

### **ANALYSIS**

OWCP accepted appellant's claims for right knee contusion, synovitis, meniscus tear and permanent aggravation of degenerative disease of the right knee, cervical sprain/strain and right shoulder contusion. It terminated appellant's compensation and medical benefits effective July 18, 2006 as it found that the weight of the medical evidence established that appellant's employment-related medical conditions had resolved. Although this decision was initially affirmed by the Board on December 19, 2008,<sup>9</sup> on a subsequent appeal it was determined that clear evidence of error existed as OWCP failed to inform the second opinion physician, Dr. Goldman, and the impartial medical examiner, Dr. Collis, that appellant's claim had been accepted for permanent aggravation of degenerative disease of the right knee.<sup>10</sup> Subsequent to the Board's decision, OWCP referred appellant for a second opinion examination by Dr. Lentini, who concluded that appellant's accepted work conditions have resolved. Based on the opinion of Dr. Lentini, OWCP denied modification of its prior decision terminating appellant's compensation effective July 18, 2006 and finding that appellant had not established continuing disability or residuals after that date.

The Board finds that OWCP's termination of benefits must be reversed. The Board's April 26, 2011 decision found that appellant had established clear evidence of error in OWCP's

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<sup>6</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>7</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>8</sup> *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>9</sup> Docket No. 08-780 (issued December 19, 2008).

<sup>10</sup> Docket No. 10-1362 (issued April 26, 2011).

termination of benefits because the statement of accepted facts was defective. At the time the Board remanded the case to OWCP, there remained an unresolved conflict in medical opinion due to the defective statement of accepted facts. On remand, OWCP should have sent appellant to a new impartial medical examiner with a corrected statement of facts. Instead, it sent appellant for a new second opinion.

Pursuant to 5 U.S.C. § 8123(a), there is a disagreement between the physician making the examination for the United States and the physicians of the employee. OWCP should have referred appellant to an impartial medical specialist.<sup>11</sup> Without a resolution of the conflict, the Board finds that OWCP improperly denied modification of its termination decision.<sup>12</sup>

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 12, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 21, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>11</sup> See *M.D.*, Docket No. 11-928 (issued December 1, 2011).

<sup>12</sup> Due to the disposition of the termination issue, the remaining issue is moot.