

that OWCP had accepted an unspecified enthesopathy of the right knee and right knee bursitis. OWCP paid compensation for wage loss due to medical appointments and treatment. On November 24, 2008 appellant received a schedule award for a 50 percent impairment of her right leg due to gait derangement in the presence of moderate right knee osteoarthritis.²

Dr. Vatche Cabayan, the attending Board-certified orthopedic surgeon, submitted periodic reports. Appellant was permanent and stationary since January 2008 and in November 2009 she reported feeling basically the same. Dr. Cabayan noted that she was laid off from her job. In 2010, appellant had right knee pain in the anteromedial and lateral area. She used a cane for stability. In October 2010, appellant complained of having painful bulging on the back of the right knee as well as a catching and pinching sensation over the lateral aspect of the joint line. X-rays showed moderate arthrosis over the medial compartment. Appellant began using a knee brace with some improvement in 2011. She reported swelling with the right foot and ankle, especially after long walks. Appellant complained of having some swelling on the left side as well. In February 2012, Dr. Cabayan noted that appellant was dealing with her diabetes. Appellant had difficulty walking. Both ankles were swollen. Appellant's right knee was also swollen and painful. She had limited range of motion, instability and always used a cane. Standing x-rays of appellant's right knee revealed almost bone-to-bone contact along the medial articular surface. In April 2012, Dr. Cabayan noted that appellant had gained quite a bit of weight since she last worked in 2009. He diagnosed right knee inflammation along the medial joint line as well as patellar tendinitis with injury to the attachment of the patellar tendon to the patella. In June 2012, appellant presented in an electric scooter because she could not walk very far.

OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion on the status of the accepted employment injury. In a September 4, 2012 report, he reviewed the statement of accepted facts and related appellant's history and complaints. Dr. Swartz described his findings on physical examination and reviewed the medical record.

Dr. Swartz diagnosed chronic degenerative disc disease and arthritis of the lumbar spine, mild disc bulge at L2-3 with anterior osteophyte formation at L3 and basically an unremarkable examination of the lumbar spine compatible with age-related changes. He also diagnosed right patellofemoral chondromalacia and extreme obesity. Dr. Swartz noted that appellant has sustained a temporary aggravation of preexisting chondromalacia in the right patella. Appellant did not fall or strike or hit the knee. Her claim was instead based on the gradual onset of right knee pain associated with her work activities. Dr. Swartz stated that the repetitive straining injury to the right knee produced only a temporary aggravation of her preexisting chondromalacia.

Dr. Swartz opined that this temporary aggravation of preexisting chondromalacia would have subsided within six months of the last day appellant worked or by May 2010. Appellant's current condition was no longer industrial related. Dr. Swartz noted a June 2006 medical report

² In a separate claim OWCP File No. xxxxxx056, OWCP accepted that appellant sustained a traumatic lumbosacral strain on September 13, 2005. That claim is before the Board on a separate appeal (Docket No. 13-1416).

stating that nonindustrial contributing factors for delayed recovery included obesity and diabetes. He agreed that appellant's morbid obesity and diabetes were currently affecting her right knee, in addition to preexisting chondromalacia. All of appellant's findings were nonindustrial and would not be considered residual to her injury. Dr. Swartz concluded that she was fully recovered.

On October 30, 2012 Dr. Cabayan reviewed Dr. Swartz' opinion and stated: "To state that somebody has chondromalacia means there is softening of cartilage which is typically irreversible. To acknowledge that there is a chondromalacia industrially is to suggest that there is irreversible change. To suggest that industrial injury, therefore, recovered with a diagnosis of chondromalacia is to state that what is impossible namely the cartilage recovered on its own following industrial injury. So there is a gross distortion of facts." He added that appellant's inactivity was causing increasing weight gain, which made matters worse and was not at all preindustrial. "It is aggravated by the industrial incident as well including obesity."

In a decision dated December 20, 2012, OWCP terminated appellant compensation benefits for the accepted medical condition. It found that Dr. Swartz' opinion represented the weight of the medical evidence. OWCP noted that Dr. Cabayan did not explain how appellant's current condition continued to be work related or how the accepted temporary aggravation of her preexisting right knee condition has not ceased.

On March 14, 2013 Dr. Cabayan observed that "chondromalacia would be a different diagnosis than soft tissue injury and bursitis and tendinitis that Dr. Swartz is talking about and to state that the chondromalacia was preexistent [is] purely speculative not based on any facts whatsoever." He added: "I totally disagree with Dr. Swartz as well as the opinion provided by [the] claims examiner as to the indication that [appellant's] benefits are being terminated."

On May 14, 2013 Dr. Cabayan discussed the nature of chondromalacia. He noted that appellant did not have chondromalacia along her patella prior to the industrial injury; therefore, the right knee should be covered industrially. Dr. Cabayan also addressed consequential weight gain and a consequential left knee injury.

In a decision dated June 12, 2013, an OWCP hearing representative affirmed the termination of appellant's compensation benefits. He found a conflict in medical opinion and remanded the case for an impartial medical specialist to resolve the conflict between Dr. Swartz and Dr. Cabayan. The hearing representative found that the conflict arose after OWCP's termination decision; thus appellant was not entitled to reinstatement of her benefits pending further development of the evidence.

On appeal, appellant's representative contends that the conflict should be resolved before considering any termination of benefits. He adds that it appears OWCP failed to provide proper notice that a second opinion had been arranged for this claim.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to 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

ANALYSIS

OWCP accepted appellant's occupational disease claim for a temporary aggravation of right knee bursitis. The statement of accepted facts indicated that it had also accepted an unspecified enthesopathy of the right knee and right knee bursitis. To justify its termination of compensation benefits, OWCP must establish that appellant no longer suffers from the accepted medical conditions or that these medical conditions are no longer related to her federal employment.

The record does not establish that OWCP accepted appellant's claim for chondromalacia. OWCP carries no burden of proof with respect to this medical condition. It is appellant who attempts to expand her claim to include right chondromalacia patella, consequential obesity and a consequential left knee injury. Appellant, therefore, bears the burden of proof to establish her entitlement to compensation benefits for these particular conditions.⁶ OWCP's burden, which is the subject of the present appeal, is limited to the accepted medical conditions.

OWCP terminated compensation for the accepted medical conditions on the basis of Dr. Swartz' September 4, 2012 second opinion. It provided him with the case record and a statement of accepted facts so he could base his opinion on a proper factual and medical history. Dr. Swartz acknowledged that OWCP had accepted appellant's occupational disease claim for right knee enthesopathy and right knee bursitis. He also acknowledged that she received a schedule award for a 50 percent impairment of her right lower extremity.

Dr. Swartz, however, did not directly address the accepted medical conditions of unspecified enthesopathy and right knee bursitis. Rather, he opined that appellant had suffered a temporary aggravation of preexisting chondromalacia in the right patella, residuals of which would have subsided within six months after she stopped work. Although Dr. Swartz currently

³ 5 U.S.C. § 8102(a).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989) (a claimant seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the evidence, including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury).

diagnosed patellofemoral chondromalacia of the right knee, he believed that it was due to obesity and diabetes and that there were no residuals referable to injury-related factors.

The Board finds that Dr. Swartz' opinion is insufficient to establish that the accepted medical conditions have resolved or that they are no longer related to appellant's federal employment. He did not discuss the accepted medical conditions. He focused instead on chondromalacia. Dr. Swartz' opinion, essentially, was that appellant no longer suffers from an aggravation of a medical condition that OWCP did not accept. This does not support OWCP's decision to terminate compensation benefits for the medical conditions it did accept.

The Board finds that OWCP failed to discharge its burden of proof to terminate appellant's compensation benefits for the accepted medical conditions. As OWCP did not meet its burden of proof, the Board will reverse OWCP's June 12, 2013 decision on the issue of termination and remand the case for reinstatement of compensation benefits retroactive to the effective date of termination.

OWCP may, of course, further develop the medical evidence as the hearing representative has directed. The Board has no jurisdiction to review such interlocutory matters.⁷ With respect to the observation made by appellant's representative that OWCP apparently failed to provide notice that a second-opinion evaluation had been arranged in this case, the Board finds no reversible error. OWCP referred appellant to Dr. Swartz to evaluate her right knee under this claim and her low back under another claim. Appellant obviously received notice of the examination: she appeared. The representative makes no contention that OWCP failed to provide notice of her rights and responsibilities, including her right, if she so desired, to arrange to have a physician of her choice, paid by her, present at the examination. Further, the Board can find no objection raised by appellant or her representative, following Dr. Swartz' examination and report, about any failure of notice. The Board finds that his opinion is insufficient to discharge OWCP's burden of proof.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits for the accepted medical conditions. Dr. Swartz' second opinion was insufficient to discharge OWCP's burden of proof.

⁷ 20 C.F.R. § 501.3(c)(2).

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is reversed on the issues of termination and reinstatement of compensation benefits.

Issued: November 20, 2013
Washington, DC

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

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

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