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N.E., Appellant)	
)	
and)	Docket No. 14-197
)	Issued: April 25, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Baltimore, MD, Employer)	
)	

Case Submitted on the Record

DECISION AND ORDER

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On November 5, 2013 appellant, through her attorney, filed a timely appeal from an August 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant established an employment-related condition or disability after August 15, 2012, when OWCP terminated her compensation benefits.

On January 29, 2010 appellant, then a 37-year-old letter carrier, sustained injuries in a motor vehicle accident while in the performance of duty. On April 15, 2010 OWCP accepted the claim for cervical, thoracic and lumbar sprains, laceration of the spleen and an abdominal wall

¹ 5 U.S.C. § 8101 *et seq.*

contusion. Appellant returned to a light-duty position and then stopped working on April 22, 2010. She received compensation for wage loss.

In a report dated July 20, 2010, the attending physician, Dr. Robert Cadogan, a Board-certified family practitioner, diagnosed thoracolumbar sprain with facet injuries and right knee patellofemoral pain. He advised that appellant remained disabled.

Appellant was referred by OWCP to Dr. Robert Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 6, 2010, Dr. Smith reviewed a history of injury and results on examination. With regard to the accepted sprains, he found that the conditions had resolved. With respect to the abdominal contusion and spleen laceration, appellant was at maximum medical improvement. Dr. Smith noted that her right knee condition had not been accepted as employment related and stated that April 2010 testing showed chondromalacia, not a post-traumatic condition.

OWCP found that a conflict in medical opinion between Dr. Cadogan and Dr. Smith. It referred appellant to Dr. Edward Cohen, a Board-certified orthopedic surgeon, selected as the impartial referee physician to resolve the conflict. In a report dated November 16, 2010, Dr. Cohen provided a history and results on examination. He diagnosed neck and back sprains "with subjective residuals only," preexisting degenerative lumbar disc disease, resolved right knee contusion and preexisting chondromalacia patella of the right knee.

On March 22, 2011 OWCP advised appellant that her claim had also been accepted for a right knee sprain. By letter dated June 16, 2011, it advised her that it proposed to terminate her wage-loss and medical benefits, as the report of Dr. Cohen represented the weight of the medical evidence.

By decision dated July 20, 2011, OWCP terminated appellant's compensation for wage-loss and medical benefits.

On July 28, 2011 appellant requested an oral hearing.

In a decision dated October 5, 2011, an OWCP hearing representative reversed the July 20, 2011 decision. The hearing representative noted that the claim had been accepted for a right knee sprain and Dr. Cohen had not reviewed the diagnostic tests dated April 1, 2011. The case was remanded for a supplemental report from Dr. Cohen.

In a report dated December 8, 2011, Dr. Cohen listed results on examination and reviewed the medical records. He opined that appellant had reached maximum medical improvement and he saw no need for ongoing treatment to the back or knee as a result of the employment injury.

By decision dated January 17, 2012, OWCP terminated appellant's compensation for wage-loss and medical benefits.

Appellant requested an oral hearing before an OWCP hearing representative. In a decision dated April 12, 2012, the hearing representative reversed the January 17, 2012 decision.

The hearing representative found that Dr. Cohen did not provide a fully rationalized medical opinion. OWCP was directed to request a supplemental report.

In a report dated April 19, 2012, Dr. Cohen stated that he had reviewed the medical evidence of record. He opined that his opinion remained unchanged. Dr. Cohen stated that there was no disabling condition to the right knee and the recent magnetic resonance imaging scan showed mild effusion with no evidence of any damage or alteration to an anatomical structure.

OWCP advised appellant by letter dated May 17, 2012 that it proposed to terminate her compensation. On May 29, 2012 appellant submitted a February 14, 2012 report from Dr. Michael Dvorkin, a Board-certified orthopedic surgeon, who advised that radiographs showed patellofemoral arthritis. On April 3, 2012 Dr. Dvorkin stated that she had right knee surgery on March 14, 2012, noting that foreign bodies were removed from what appeared to be a traumatic injury to the iliofemoral condyle. In a report dated May 3, 2012, he stated that appellant had made good progress and would benefit from physical therapy and should remain out of work.

The medical evidence from Dr. Dvorkin was sent to Dr. Cohen for review. In a report dated July 3, 2012, Dr. Cohen stated that appellant's ongoing knee complaints were related to osteoarthritis of the knee, an ordinary disease of life.

By decision dated August 15, 2012, OWCP terminated compensation for wage-loss and medical benefits effective that date. It found that Dr. Cohen represented the weight of the medical evidence.

Appellant requested a hearing before an OWCP hearing representative, which was held on December 6, 2012. By decision dated February 13, 2013, the hearing representative affirmed the termination of compensation. The hearing representative found the weight of the evidence was represented by Dr. Cohen.

On March 15, 2013 appellant requested reconsideration and submitted additional evidence. In a report dated February 26, 2013, Dr. Dvorkin stated that he treated her for a work-related injury on January 29, 2010. Appellant had a debridement of the medial femoral condyle and patellofemoral joint due to her traumatic injury. On February 28, 2013 Dr. Dvorkin noted that the March 14, 2012 surgery found an osteochondral traumatic injury of the medial femoral condyle and degenerative arthritis of the patellofemoral joint. He stated, "In regard to causality, I feel that the January 29, 2010 injury sustained to the knee joint included damage to the medial femoral condyle, traumatic in origin, consistent with an osteochondral injury as well as some fragmentation of the medial femoral condyle from the injury resulting in loose bodies. [Appellant] also clearly had underlying degenerative arthritis of the medial femoral condyle and the patellofemoral joint." Dr. Dvorkin reported that she was asymptomatic prior to the work injury and, although her arthritis was preexisting, he believed the accident caused exacerbation of the underlying degenerative arthritis as well as damage to the medial femoral condyle and loose bodies. Appellant also developed a deep venous thrombosis postoperatively and required a blood thinning medication, which was related to the work injury since the injury required surgical intervention.

By decision dated August 28, 2013, OWCP reviewed the case on its merits and denied modification of the August 15, 2012 decision.

LEGAL PRECEDENT

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related condition or disability which continued after termination of compensation benefits.²

5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.³ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict in the medical evidence.⁴ Although a physician may be selected as a referee physician, if there is no conflict with respect to the specific issue considered, the physician is considered a second opinion physician and the report is considered for its probative value.⁵

ANALYSIS

OWCP terminated compensation for wage-loss and medical benefits effective August 15, 2012. This decision was reviewed by an OWCP hearing representative in a decision dated February 13, 2013. Appellant did not appeal from the February 13, 2013 decision, which reviewed the termination of compensation, to the Board within 180 days. For decisions of OWCP issued on or after November 19, 2008, the Board's jurisdiction is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision.⁶

Appellant obtained reports from Dr. Dvorkin dated February 26 and 28, 2013 and submitted the evidence to OWCP with a request for reconsideration. The burden of proof shifted to her to establish a continuing employment-related condition or disability after August 15, 2012.

Appellant has submitted medical evidence from Dr. Dvorkin who found an aggravation of her underlying right knee degenerative arthritis as well as damage to the medial femoral condyle and loose bodies. Dr. Dvorkin discussed the findings from the March 14, 2012 knee

² *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

³ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

⁴ *William C. Bush*, 40 ECAB 1064 (1989). This is called a referee or impartial examination. 20 C.F.R. § 10.321.

⁵ *B.P.*, Docket No. 13-196 (issued March 26, 2013); *R.B.*, Docket No. 11-1616 (issued March 1, 2012); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

⁶ *See* 20 C.F.R. § 501.3(e).

surgery and addressed how the conditions were causally related to the accepted employment injury.

Dr. Cohen disagreed with Dr. Dvorkin with respect to a continuing employment-related right knee condition. He stated that the osteoarthritis was unrelated to the employment injury and that all residuals of the accepted conditions had ceased. Although Dr. Cohen had been selected as a referee physician, there was no conflict at the time of selection with respect to an aggravation of degenerative arthritis or a medial femoral condyle injury. There had been no probative medical opinions on regarding an aggravation of degenerative arthritis or medial femoral condyle injury and there was no disagreement under 5 U.S.C. § 8123(a). With respect to this issue, Dr. Cohen is a second opinion physician.

The Board finds that a conflict exists between Dr. Dvorkin and Dr. Cohen with respect to the causal relationship between the employment injury and an aggravation of right knee degenerative arthritis, medial condyle damage and the other findings from the March 14, 2012 surgery. Pursuant to 5 U.S.C. § 8123(a), the case will be remanded for selection of a referee physician and resolution of the conflict. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for additional development.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2013 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: April 25, 2014
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