

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

M.L., Appellant	)	
	)	
and	)	<b>Docket No. 14-604</b>
	)	<b>Issued: July 2, 2014</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
BUSTLETON STATION, Philadelphia, PA,	)	
Employer	)	
	)	

*Appearances:*  
Richard A. Daniels, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 24, 2014 appellant, through her representative, filed a timely appeal from an October 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish continuing disability for work after the prior termination of her 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.

**ISSUE**

The issue is whether appellant has established that she was disabled for work on and after May 5, 2013 due to accepted cervical and lumbar sprains, bilateral shoulder and knee contusions, a torn left medial meniscus and temporary aggravation of bilateral knee arthritis.

On appeal, appellant's representative contends that OWCP improperly characterized Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon, as an impartial medical examiner

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

as there was no conflict of medical evidence at the time of his selection. Alternatively, he asserts that Dr. Jelen's opinion should not be accorded the weight of the medical evidence because his reports were poorly rationalized.

### **FACTUAL HISTORY**

OWCP accepted that on April 2, 2009 appellant, then a 55-year-old vending technician, sustained cervical and lumbar sprains, bilateral shoulder and knee contusions, a torn left medial meniscus and a temporary aggravation of bilateral knee arthritis when a cart of boxes filled with coins toppled over on her.

Dr. Walter W. Dearolf, III, an attending Board-certified orthopedic surgeon, followed appellant beginning on April 3, 2009.<sup>2</sup> He diagnosed cervical and thoracic strains and bilateral shoulder and knee contusions, directly related to the April 2, 2009 incident. In reports through August 17, 2009, Dr. Dearolf diagnosed right-sided sciatica and a left rotator tear. He prescribed periodic lumbar epidural injections and bilateral Synvisc injections.

In reports from May 12 to July 10, 2009, Dr. Leonard A. Bruno, an attending neurosurgeon, held appellant off work beginning on May 13, 2009. He diagnosed a chronic herniated disc at C5-6 exacerbated by the April 2, 2009 cervical sprain and lumbar degenerative disc disease with facet arthropathy and right-sided sciatica aggravated by the April 2, 2009 lumbar sprain.

Appellant returned to part time, limited-duty work on May 18, 2009. Dr. Dearolf continued to limit her to working four hours a day light duty. On October 16, 2009 he performed an arthroscopic repair of the left rotator cuff. Dr. Dearolf held appellant off work through June 2010.<sup>3</sup> Appellant received appropriate wage-loss compensation through October 2010, when she returned to full-time light-duty work. OWCP accepted a March 5, 2011 recurrence of disability regarding the left knee. Appellant returned to part-time light-duty work in April 2011 and was separated from the employing establishment effective August 3, 2011 as there was no light duty available within her restrictions.<sup>4</sup> OWCP placed her case on the periodic rolls effective October 22, 2011.

On December 8, 2011 Dr. Dearolf performed an arthroscopic repair of a medial meniscal tear of the left knee and performed steroid injections in the right knee to address degenerative joint disease. Appellant underwent periodic lumbar epidural steroid injections through May 2012.

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<sup>2</sup> An April 30, 2009 magnetic resonance imaging (MRI) scan showed degenerative disc disease with disc protrusions and osteophytes from C3-7 and a fluid collection impacting the thecal sac at T7-8.

<sup>3</sup> A May 4, 2010 MRI scan of the left knee showed a torn posterior medial meniscus with Baker's cyst and soft tissue swelling. On September 30, 2011 OWCP obtained a second opinion from Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon, who recommended left knee arthroscopy.

<sup>4</sup> An August 19, 2011 electromyography (EMG) and nerve conduction velocity (NCV) studies showed moderate chronic denervation from L4 to S1. September 12, 2011 EMG and NCV studies showed right C4-6 denervation, indicative of right C4, C6 radiculopathy.

In March 19, 2012 reports, Dr. Dearolf opined that appellant was developing a frank cervical radiculopathy with numbness in the right fourth and fifth fingers.<sup>5</sup>

On May 24, 2012 OWCP obtained a second opinion from Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, who found appellant able to perform full-time light-duty work. In a June 17, 2012 supplemental report, Dr. Smith opined that appellant had no active residuals of the accepted injuries. He attributed her symptoms to idiopathic degenerative osteoarthritis, unrelated to the accepted injuries.

In a July 10, 2012 report, Dr. Dearolf opined that the accepted injuries aggravated appellant's preexisting degenerative arthritis and likely accelerated the degenerative process.

OWCP found a conflict between Dr. Dearolf, for appellant, and Dr. Smith, for the government. To resolve the conflict, it selected Dr. Jelen, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Jelen provided an August 21, 2012 report reviewing the medical record and statement of accepted facts. On examination, he noted limited cervical and lumbar motion and a loss of 15 degrees internal rotation of the left arm. Dr. Jelen diagnosed a cervical strain and cervical radiculopathy superimposed on degenerative joint disease, a lumbosacral strain, right-sided lumbar radiculopathy superimposed on degenerative disc disease. He opined that the accepted injuries had ceased without residuals and that appellant's symptoms were due to preexisting degenerative arthritis. Dr. Jelen found her able to perform full-time duty with lifting restricted to 35 pounds.

In September 11, 2012 reports, Dr. Dearolf noted that appellant still related significant lumbar pain, left knee discomfort and a positive sitting root test. He restricted her to working four hours a day sedentary duty. On January 9, 2013 appellant underwent a right L3-S1 steroid facet block. In a February 11, 2013 report, Dr. Dearolf opined that she was totally disabled for work for a minimum of six months.

OWCP referred appellant to Dr. Jelen for an updated examination after the facet block. In a February 19, 2013 report, Dr. Jelen found full cervical motion, inconsistent lumbar tenderness, inconsistent strength testing of the lower extremities and medial tenderness of the left knee. He diagnosed resolved cervical and lumbar strains with radiculopathy and a resolved aggravation of left knee arthritis. Dr. Jelen found appellant able to return to full duty with no restrictions attributable to the accepted injuries.

By notice dated March 4, 2013, OWCP advised appellant that it proposed to terminate her wage-loss and medical compensation benefits because the accepted injuries had ceased without residuals, based on Dr. Jelen's opinion as the weight of the medical evidence.

Appellant's representative responded by April 3, 2013 letter, asserting that appellant continued to be partially disabled for work. He submitted a March 27, 2013 report from Dr. Dearolf finding that appellant could perform sedentary duty for two to four hours a day. He

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<sup>5</sup> An April 4, 2012 MRI scan showed mild disc bulges at all levels from C2-7 with degenerative changes from C5-7. A May 29, 2012 MRI scan showed disc bulges at L1-2, L3-4 and L4-5. An April 20, 2012 EMG and NCV study showed moderate right-sided C6 radiculopathy.

reviewed Dr. Jelen's opinion and explained that appellant still had right-sided lumbar radiculopathy requiring periodic epidural injections and left knee pain.

OWCP then requested a supplemental report from Dr. Jelen regarding the cause of appellant's symptoms. Dr. Jelen submitted an April 5, 2013 report opining that appellant's pain symptoms were not related to the accepted injuries. He noted that her pain was tolerable and did "not represent a significant disability that would prevent her from working."

By decision dated April 10, 2013, OWCP terminated appellant's wage-loss and medical benefits effective May 5, 2013, based on Dr. Jelen's opinion as the weight of the medical evidence.

In an April 15, 2013 letter, appellant's representative requested a telephonic hearing, held August 12, 2013. During the hearing, he asserted that Dr. Jelen could not serve as impartial medical examiner as there was no conflict of medical opinion when he was selected. Appellant's representative contended that Dr. Smith's second opinion examination pertained only to whether the left knee arthroscopy was work related. Therefore, Dr. Jelen was only a second opinion physician regarding all other issues. Following the hearing, appellant's representative submitted March 2 and May 6, 2013 reports from Dr. Dearolf finding a positive siting root test on the right, mild medial joint line tenderness in the left knee and mild left quadriceps weakness. He also provided December 12, 2012 and March 25, 2013 physical therapy prescriptions from Dr. Dearolf.

By decision dated and finalized October 28, 2013, OWCP denied modification on the grounds that the additional medical evidence submitted was insufficient to establish that appellant continued to have residuals of the accepted injuries on and after May 5, 2013. It found that Dr. Dearolf's additional reports were insufficient to shift the weight of the medical evidence or require additional development.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>7</sup>

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

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<sup>6</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>7</sup> *Id.*

compensation benefits.<sup>8</sup> For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>9</sup> The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of OWCP to disprove an employment relationship.<sup>10</sup>

Section 8123(a) of FECA 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.<sup>11</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>12</sup>

### ANALYSIS

OWCP accepted that appellant sustained cervical and lumbar sprains, bilateral shoulder and knee contusions, a torn left medial meniscus and a temporary aggravation of bilateral knee arthritis on April 2, 2009 when her coin cart toppled over on her. Dr. Bruno, an attending neurosurgeon, opined that the incident aggravated a preexisting C5-6 disc herniation and right-sided lumbar sciatica. Dr. Dearolf, an attending Board-certified orthopedic surgeon, performed an arthroscopic repair of the left medial meniscus on December 8, 2011. He held appellant off work or limited her to part-time sedentary duty due to active residuals of the accepted injuries. On May 24, 2012 OWCP obtained a second opinion from Dr. Smith, a Board-certified orthopedic surgeon, who found that accepted conditions had resolved. To resolve the conflict of medical opinion, it selected Dr. Jelen, a Board-certified orthopedic surgeon, who submitted August 21, 2012, February 19 and April 5, 2013 reports explaining in detail that appellant no longer had any residuals of the accepted injuries as her subjective symptoms were due to idiopathic degenerative arthritis.

Based on Dr. Jelen's opinion as the weight of the medical evidence on April 10, 2013 OWCP terminated appellant's wage-loss and medical compensation benefits effective May 5, 2013 on the grounds that the accepted injuries ceased without residuals or work limitations. The burden now shifts to appellant to demonstrate that she continued to be disabled for work on and after May 5, 2013 due to the accepted injuries.<sup>13</sup>

At an August 12, 2013 hearing request, appellant's representative asserted that there was no conflict of medical opinion between Dr. Smith and Dr. Dearolf and that Dr. Jelen therefore

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<sup>8</sup> See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

<sup>9</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>10</sup> *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

<sup>11</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>12</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>13</sup> *Virginia Davis-Banks*, *supra* note 8.

should be considered merely a second opinion physician and not an impartial medical examiner. The Board finds, however, that there was a clear conflict of medical opinion between Dr. Smith and Dr. Dearolf regarding the nature and extent of the accepted injuries. Therefore, OWCP properly selected Dr. Jelen to serve as an impartial medical examiner.<sup>14</sup>

Following the hearing, appellant's representative submitted new reports and physical therapy prescriptions from Dr. Dearolf, noting right-sided lumbar sciatica, mild medial joint line tenderness in the left knee and mild left quadriceps weakness. However, Dr. Dearolf did not explain the medical reasons why those findings were caused by the accepted injuries and not preexisting osteoarthritis and degenerative disc disease. His opinion is therefore insufficient to shift the weight of the evidence in appellant's favor. Also, as Dr. Dearolf was on one side of the conflict resolved by Dr. Jelen, Dr. Dearolf's additional reports are insufficient to overcome the weight accorded to the impartial medical examiner or to create a new conflict.<sup>15</sup> Therefore, OWCP's October 28, 2013 decision finding that appellant did not establish that she continued to have residuals of the accepted injuries on and after May 5, 2013 is appropriate under the law and facts of the case.

On appeal, appellant's representative contends that OWCP improperly characterized Dr. Jelen as an impartial medical examiner as there was no conflict of medical evidence at the time of his selection. Alternatively, he asserts that Dr. Jelen's opinion should not be accorded the weight of the medical evidence because his reports were poorly rationalized. As stated, OWCP properly denied modification as Dr. Dearolf's opinion was insufficient to shift the weight of the medical evidence in appellant's favor or to require further development by OWCP.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### CONCLUSION

The Board finds that appellant did not establish continuing work-related disability on and after May 5, 2013.

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<sup>14</sup> 5 U.S.C. § 8123(a); *supra* note 12.

<sup>15</sup> See *Virginia Davis-Banks*, *supra* note 8, *Dorothy Sidwell*, 41 ECAB 857 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 28, 2013 is affirmed.

Issued: July 2, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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