

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

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**T.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Columbus, OH, Employer**

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**Docket No. 15-1020  
Issued: November 13, 2015**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 2, 2015 appellant, through counsel, filed a timely appeal from a December 8, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate wage-loss compensation and medical benefits effective October 7, 2013, and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals after October 7, 2013.

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

## **FACTUAL HISTORY**

On November 10, 2009 appellant, then a 43-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right hip injury in the performance of duty on November 9, 2009. She indicated on the claim form that she was walking, bending, and sweeping when she felt right hip pain. Information provided on the claim form did not indicate that appellant had stopped work. The record indicates that appellant began to receive supplemental roll payments for partial disability as of December 26, 2009. OWCP accepted the claim on January 12, 2010 for right hip and lumbar sprains. On April 1, 2010 it expanded the claim to include right knee sprain.

Appellant was treated by Dr. Timothy Duffey, an osteopath. In a report dated November 9, 2010, Dr. Duffey noted that appellant had returned to work shortly after her November 9, 2009 injury, but then had been off work for six months. Appellant continued to have right knee pain, and a May 10, 2010 magnetic resonance imaging (MRI) scan report noted a tear of the lateral meniscus. Dr. Duffey opined that the work injury aggravated a preexisting right knee osteoarthritis and caused the torn meniscus. By report dated June 13, 2011, he noted that a partial lateral meniscectomy of the right knee was performed.

The record indicates that on September 22, 2012 appellant accepted a part-time modified-duty position, including a 15-pound lifting restriction. Appellant received wage-loss compensation offset for actual earnings. On September 25, 2012 OWCP expanded the claim to include aggravation of right knee osteoarthritis.

OWCP referred appellant for a second opinion examination with Dr. Manhal Ghanma, a Board-certified orthopedic surgeon. In his February 19, 2013 report, Dr. Ghanma provided a history and results on examination. He opined that the accepted hip, lumbar, and right knee sprains had resolved. Dr. Ghanma reported there was no evidence of a continuing aggravation of right knee osteoarthritis, and any aggravation would have been a temporary flare-up of symptoms. He opined that appellant could perform her date-of-injury position and there was no employment-related disability.

Appellant returned to a full-time, modified-duty position on March 1, 2013. Dr. Duffey noted in a March 26, 2013 report that appellant continued to have work restrictions with respect to her right knee as she continued to have swelling and pain, with a diminished ability to walk.

OWCP determined that a conflict in the medical evidence existed between Drs. Duffey and Ghanma with respect to appellant's employment-related condition and disability. To resolve the conflict, Dr. Michael Lefkowitz, a Board-certified orthopedic surgeon, was selected as a referee physician.

In a report dated July 9, 2013, Dr. Lefkowitz provided a history, results on examination, and noted his review of the medical evidence. He opined that the employment-related hip, back, and knee sprains had resolved, noting that they were soft tissue injuries that had been resolved since the 2009 injury. Dr. Lefkowitz noted that an aggravation of right knee osteoarthritis was not the cause of appellant's current symptoms, but that her current symptoms related instead to right hip arthritis. He noted that she was clear that her initial symptoms did not occur in the right

knee, and that right knee pain could arise from hip arthritis. Dr. Lefkowitz further noted, “Numerous physician reports as well as [appellant’s] own reported injury point to a mechanism more involving the hip than the knee. Therefore, I do not believe the medical evidence in fact supports an aggravation substantial of the right knee osteoarthritis, but instead if anything would have supported osteoarthritis of her right hip. This of course is a retrospective review and thus I am not suggesting that appellant add aggravation of the right hip arthritis, but rather simply that the diagnosis of osteoarthritis aggravation of her right knee is not medically supported by this chart.” Dr. Lefkowitz opined that the “aggravation of preexisting osteoarthritis I do not believe is currently the main cause of her symptoms and in addition I am unclear as to whether this should have been an allowed condition. Therefore, I do not believe that appellant’s current residual limitations are based on her work-related conditions. I do, however, feel that her medical conditions, which again are not work related, are causing her to have limitations in her activities. I do not feel that it is safe for her to kneel or squat.”

By letter dated September 5, 2013, OWCP advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits.<sup>2</sup> Appellant was advised to submit evidence or argument within 30 days. She submitted an October 1, 2013 report from Dr. Duffey, stating that she continued to have right knee pain.

By decision dated October 7, 2013, OWCP terminated compensation for wage-loss and medical benefits, finding that the medical evidence established that appellant’s accepted employment-related conditions had resolved.

Appellant, through counsel, requested a hearing before an OWCP hearing representative in a letter dated October 9, 2013. A hearing was held on April 15, 2014. By decision dated June 27, 2014, the hearing representative affirmed the October 7, 2013 termination. He found the weight of the evidence rested with Dr. Lefkowitz.

Appellant requested reconsideration by letter dated September 9, 2014. She submitted an August 11, 2014 report from Dr. Charles May, an osteopath. Dr. May wrote that he did not understand how OWCP could accept the report of Dr. Lefkowitz, who did not accept right knee osteoarthritis aggravation. He opined that appellant had an employment-related aggravation of right knee osteoarthritis. In a report dated September 12, 2014, Dr. Duffey noted that he had last seen her on October 1, 2013. He noted that appellant had damage to the articular surface of the right knee from the work injury. Dr. Duffey opined that she had sustained a lateral meniscus tear from the employment injury. He noted that appellant had abnormal mechanics and misalignment of the knee that would increase in severity over the years.

By decision dated December 8, 2014, OWCP reviewed the case on its merits, but denied modification.

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<sup>2</sup> According to the record, appellant was not then receiving wage-loss compensation. As noted above, she had returned to full-time work on March 1, 2013.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her hemployment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>4</sup>

It is well established that when a case is referred to a referee 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.<sup>5</sup>

## ANALYSIS -- ISSUE 1

In the present case, OWCP accepted that appellant sustained right hip, right knee, and lumbar sprains, as well as aggravation of right knee osteoarthritis, in the performance of duty on November 9, 2009. It terminated compensation, effective October 7, 2013. With respect to the accepted conditions, it is OWCP's burden of proof to terminate compensation for wage-loss and medical benefits.<sup>6</sup>

OWCP found that a conflict existed under 5 U.S.C. § 8123(a) with respect to the status of appellant's employment-related conditions.<sup>7</sup> Attending physician Dr. Duffey opined that appellant continued to have an employment-related aggravation of right knee osteoarthritis causing work restrictions. A second opinion physician, Dr. Ghanma, opined in a February 19, 2013 report that appellant's employment-related conditions had resolved. OWCP properly determined that a conflict existed in the medical opinion evidence and selected Dr. Lefkowitz as a referee physician to resolve the conflict.

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<sup>3</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

<sup>4</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>5</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>6</sup> As noted above, the record indicated that appellant had returned to full-time work as of March 1, 2013 and had not been receiving wage-loss compensation at the time of the October 7, 2013 decision.

<sup>7</sup> FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

The Board finds that Dr. Lefkowitz provided a rationalized opinion that appellant's accepted conditions had resolved. Dr. Lefkowitz explained that the accepted sprains were soft tissue injuries that had resolved. As to the aggravation of right knee osteoarthritis, counsel argued before OWCP's hearing representative that Dr. Lefkowitz had failed to acknowledge that it was an accepted condition. Dr. Lefkowitz, however, did indicate that it was an accepted condition, and in the context of a termination, the issue is whether appellant continued to have residuals of the aggravation of right knee osteoarthritis. If he had failed to address the accepted condition then his opinion would be of diminished probative value.<sup>8</sup> In this case, however, Dr. Lefkowitz clearly opined that appellant did not have continuing right knee osteoarthritis. He explained that her right knee symptoms were instead due to right hip osteoarthritis.

As to the accepted conditions in this case, the Board finds that Dr. Lefkowitz represents the weight of the medical evidence. As noted above, a rationalized opinion from a referee physician is entitled to special weight. OWCP, therefore, met its burden of proof to terminate compensation for wage-loss and medical benefits for the accepted conditions effective October 7, 2013.

### **LEGAL PRECEDENT -- ISSUE 2**

Appellant has the burden to establish any additional conditions for which compensation is claimed as causally related to the employment injury.<sup>9</sup> 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 he had an employment-related condition or disability which continued after termination of compensation benefits.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

After the June 27, 2014 decision, affirming the termination of compensation, appellant requested reconsideration and submitted an August 11, 2014 report from Dr. May. This report is insufficient to meet her burden of proof to establish a continuing employment-related disability after October 7, 2013. Dr. May reported that he did not understand how OWCP could accept the report of Dr. Lefkowitz. The report of Dr. Lefkowitz provided a rationalized medical opinion that the accepted conditions had resolved. Dr. May opined that appellant had an aggravation of right knee osteoarthritis, but did not discuss whether she continued to have an employment-related disability after October 7, 2013. He did not provide a rationalized medical opinion on the issue of continuing disability.

Appellant also submitted a September 12, 2014 report from Dr. Duffey. Dr. Duffey noted that he last treated her on October 1, 2013. He, however, does not provide a rationalized

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<sup>8</sup> See *P.G.*, Docket No. 13-0902 (issued February 20, 2014).

<sup>9</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989); see also *G.B.*, Docket No. 14-1241 (issued June 22, 2015).

<sup>10</sup> *Talmdage Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

opinion with respect to a continuing employment-related disability after October 7, 2013. Dr. Duffey reported that appellant had damage to the articular surface of the right knee, opined that a meniscus tear was causally related to the November 9, 2009 employment injury, and that the condition continued to cause symptoms.<sup>11</sup> He did not, however, provide a rationalized medical opinion based on a complete history.<sup>12</sup> Dr. Duffey did not discuss the employment injury, the medical history, or the mechanism of injury explaining why he believed appellant sustained a lateral meniscus tear in the performance of duty on November 9, 2009.

It is appellant's burden of proof to establish a continuing employment-related disability after proper termination of compensation. The Board finds the medical evidence submitted is insufficient to meet her burden of proof.

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 OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits for the accepted conditions. The Board further finds that appellant did not meet her burden of proof to establish an employment-related continuing disability after October 7, 2013.

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<sup>11</sup> As noted in the factual history, appellant underwent right knee arthroscopic surgery on June 13, 2011.

<sup>12</sup> Medical rationale is a medically sound explanation for the opinion offered. *See Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983)(the evidence must convince the adjudicator that the conclusion drawn is rational, sound and logical).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 8, 2014 is affirmed.

Issued: November 13, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board