United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 15-0321**
	)	**Issued: October 6, 2015**
DEPARTMENT OF THE ARMY, PHYSICAL SECURITY DIVISION, DIRECTORATE OF EMERGENCY SERVICES, Fort McCoy, WI, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 25, 2014 appellant, through counsel, filed a timely appeal from an August 18, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP properly denied appellant's request for knee surgeries.

On appeal appellant, through counsel, argues that she provided abundant factual and medical evidence to establish that she injured both knees as a result of the employment incident, that she required surgery on both knees, and that OWCP's decision should be reversed. In the

[1] 5 U.S.C. § 8101 *et seq.*

alternative, counsel argues that at the very least there was a conflict in the medical evidence and the case should be referred to a referee physician.

FACTUAL HISTORY

On July 11, 2011 appellant, then a 35-year-old criminal investigator, filed a traumatic injury claim alleging that on July 8, 2011 she parked a government vehicle in a lot adjacent to the old Walson Hospital and was walking through the parking lot back to the main building when she tripped over a curb. She listed the nature of her injury as dislocation of the knees and further undetermined injuries.

Appellant was seen on July 11, 2011 by Dr. Michael Ruggerio, an osteopath, who noted that she fell on both knees after she tripped on a curb at work. Dr. Ruggerio assessed her with internal derangement of the knees.

Dr. Fotios Tjoumakaris, a Board-certified orthopedic surgeon, treated appellant on July 18, August 22, and September 7, 2011. He diagnosed left knee chondromalacia status post patellofemoral dislocation with increased thinning of her articular cartilage and an acute exacerbation of some mild underlying chondromalacia.

By decision dated October 3, 2011, OWCP denied appellant's claim, finding that she had not established that the incident occurred as alleged.

On October 12, 2011 appellant requested an oral hearing before an OWCP hearing representative.

Appellant submitted a July 21, 2011 magnetic resonance imaging (MRI) scan taken of the right knee without contrast, interpreted by Dr. Siddharth Prakash, a Board-certified radiologist. Dr. Prakash found mild medial joint space narrowing with thinning of the underlying articular cartilage; no meniscal or ligamentous tear; suprapatellar joint effusion; and chondromalacia patella. He noted that appellant sustained patellar dislocation following a fall on July 8, 2011.

In an October 6, 2011 report, Dr. Jason Wong, appellant's treating osteopath, noted that appellant came in for an evaluation of her knees. He noted that at the beginning of July 2011, she had been walking with heels and got the right heel caught in a crack on a curve and fell on both knees. Dr. Wong listed his impression as most likely either an impinging medial patellofemoral joint fat pad or a medial meniscal tear of the right knee. With regard to the left knee, he opined that appellant may have a similar problem, but not to the same extent.

An October 12, 2011 MRI scan of the right knee was interpreted by Dr. Kevin Willis, a Board-certified radiologist. Dr. Willis found intact cruciate ligaments and menisci, but abnormal signal involving Hoffa's fat pad with findings suggestive of patellar tracking abnormality/mild patellofemoral friction syndrome, associated small suprapatellar joint effusion. An MRI scan of the same date on the left knee was interpreted as showing minimal, compartmental degenerative change, predominantly involving thinning of the articular cartilage. Dr. Willis found no evidence of a meniscal tear in either knee and determined that the cruciate ligaments were intact. He noted that there was straining of Hoffa's fat pad in the right knee medially with mild abnormal signal involving the lateral patellar facet and the lateral trochlear ridge. Dr. Willis

noted that the findings can be seen in patellofemoral friction syndrome/patellar tracking abnormality, and that clinical correlation was recommended.

In an October 13, 2011 report, Dr. Wong listed the diagnosis as symptomatic medial patellofemoral plica, right knee and left knee, more so on right. On December 12, 2011 he performed an arthroscopy of the left knee with excision of medial and lateral patellofemoral plica and excision of fat pad with the lateral retinacular release and an injection.

Appellant continued to submit reports by Dr. Wong. In a February 26, 2012 report, Dr. Wong noted that he first saw her on October 6, 2011 for evaluation of her knee conditions. He discussed in detail appellant's history of falling three months earlier at the employing establishment and his subsequent medical treatment of her. Dr. Wong diagnosed symptomatic patellofemoral plica and impinging fat pad bilaterally. He opined that the condition in both of appellant's knees was caused and precipitated by her injury. Dr. Wong indicated that the medical reason for this opinion was that she had direct trauma to the anterior aspect of both knees, which occurred when she fell on both of her knees while at work. He noted that appellant required further physical therapy and strengthening to her left knee and does require surgical intervention due to the continued pain in her right knee.

In a May 10, 2012 decision, the hearing representative remanded the case for further development of the medical evidence.

On September 4, 2012 OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion. In a September 19, 2012 report, Dr. Heist reviewed appellant's employment history, medical records, and conducted a physical examination. He diagnosed her with status postoperative arthroscopic surgery on the left knee, excision fat pad, plica and lateral release (not work related) and sprained right knee, and aggravation of patella chondromalacia (preexisting). Dr. Heist noted that his examination revealed right knee tenderness with lateral patella motion and slight crepitation with acute flexion of the right knee. He opined that these positive findings are related to appellant's preexisting condition of chondromalacia of the patella and not related to her July 8, 2011 fall. Dr. Heist opined that she temporarily aggravated her preexisting condition and that this has since resolved. He concluded that appellant subsequently had a lateral release performed to her left knee, but that this procedure was done for the preexisting condition of chondromalacia patella and not related to her work injury.

By decision dated November 28, 2012, OWCP accepted appellant's claim for sprain of the right knee (resolved as of September 24, 2012) and temporary aggravation of chondromalacia patellae of the right knee (resolved September 24, 2012). In a decision of the same date, it denied her claim for right knee surgical excision of plica and fat pad.

On December 6, 2012 appellant, through counsel, requested a hearing. By letter dated March 22, 2013, counsel requested that the hearing be changed to a review of the written record.

In a December 20, 2012 report, Dr. Wong noted that appellant came in for a follow-up on her knees. He noted that she continued to have pain and discomfort over the anterior aspect of the right knee and that she does have a little click and pop with the knee. Dr. Wong noted that

appellant's new MRI scan was interpreted by the radiologist as showing a strain pattern to the anterior cruciate ligament (ACL), but did not specifically evince that there was anything underneath the knee. However, he noted that, when he independently viewed the film, it evinced that she had a hypertrophic fat pad. Dr. Wong noted that appellant actually had some fluid with the fat pad and she does have a medial patellofemoral plica, which is what he believed had been injured when she fell directly on to her knee. He listed his impression as symptomatic medical patellofemoral plica and impinging fat pad of the right knee, which was exacerbated by a fall which occurred when she was at work. Dr. Wong noted that at this time he recommended that he arthroscope the knee, excise the fat pad, excise the plica, and address anything else in the knee. He noted that there may be a slight possibility she might have a very posterior root tear of the lateral meniscus.

Appellant continued to submit progress reports by Dr. Wong. In an April 2, 2013 report, Dr. Wong noted that he reviewed the opinion of Dr. Heist and that he disagreed with his finding that appellant had preexisting chondromalacia. He noted that appellant was seen in the emergency room for a dislocated kneecap, which was relocated in the emergency room. Dr. Wong noted that she had gravel from the asphalt pulled from her knee during the emergency room visit. He explained that, if appellant did have preexisting chondromalacia, her injury which occurred from her fall at work exacerbated her chondromalacia. Dr. Wong noted that there was "no denying that she did sustain a dislocated patella during her injury and she had also injured her left knee at the same time." He noted that appellant continued to have pain and discomfort to the knee and that he believed that it was appropriate that she undergo further surgical intervention to relieve the discomfort. Dr. Wong noted that she did undergo surgery to her left knee, which relieved her symptomatology. He further noted that appellant's injury to her right knee seems to be more substantial and has not yet been treated. Dr. Wong therefore opined that Dr. Heist's evaluation, although well respected, was inaccurate.

By decision dated May 31, 2013, the hearing representative affirmed the November 28, 2012 decision, finding that the weight of the medical evidence failed to support that appellant had "plica and/or fat pad in the right knee causally related to the accepted employment trauma and/or injury of July 8, 2011."

By letter dated August 22, 2013, appellant, through counsel, requested reconsideration. In support thereof, counsel submitted an August 14, 2013 report by Dr. Wong, wherein he noted that he continued to disagree with Dr. Heist. He noted that, prior to his first visit with appellant on October 6, 2011, she had a July 21, 2011 MRI scan done which was two weeks after the initial injury and that according to the radiologist, she had medial joint space narrowing and thinning of the underlying articular cartilage as well as chondromalacia of the patella. Dr. Wong noted that he reviewed the films and they showed that she had a high signal within the suprapatellar pouch and throughout the infrapatellar fat pad. He noted that he did not see any obvious meniscal lesion, although appellant did complain of pain over the medial joint. Dr. Wong noted that on that date she had impinging medial patellofemoral fat pad or a medial meniscal tear of the right knee.

Dr. Wong also noted that a new MRI scan of the knee was obtained on October 12, 2011, and at that time, the radiologist read that appellant had minimal tricompartmental degenerative change predominantly involving thinning of the articular cartilage with no evidence of meniscal

tear. He noted that she did have stranding of the Hoffa's fat pad and medically and mild abnormal signal involving the lateral patellar facet and lateral trochlear ridge. Dr. Wong noted that findings could be seen with patellofemoral fraction syndrome and patellar tracking abnormality, which in his opinion was caused by the lateral dislocation of appellant's patella due to the fall. He opined that at this time, the only option to relieve her pain and to resume normal activities of daily living would be to arthroscope the knee and excise the fat pad as well as the medial patellofemoral plica.

Dr. Wong opined that it was within a reasonable degree of certainty that appellant's trauma caused the damage to her knee including chondromalacia, which can be caused by direct trauma to the anterior aspect of the knee for the following reasons: she had no prior complaints of pain and discomfort to her knee; appellant did sustain direct trauma to the anterior aspect of her knee which resulted in a dislocation of the patella for which she was seen in the emergency room; she had continued pain and disability related to the injury despite conservative care; and that chondromalcia of the patella is most certainly related to direct trauma to the anterior aspect of the knee, which reflects an injury and trauma to the articular cartilage, which can be sustained with direct trauma as well as with lateral dislocation of the patella. He noted that she sustained intraarticular internal derangement of her knee as reported by MRI scan reports of July 21 and October 12, 2011. Dr. Wong opined that at the time he believed that appellant would significantly improve her functional status and decrease her pain with an arthroscopic procedure to her knee to excise the infrapatellar fat pad as well as the plica. He concluded by noting that although Dr. Heist's opinions were respected that he completely disagreed with his findings.

By decision dated October 31, 2013, OWCP denied modification of the decision.

On November 22, 2013 appellant, through counsel, requested reconsideration. In support thereof, appellant submitted additional notes by Dr. Wong. These included a November 14, 2013 note wherein Dr. Wong listed his impression as symptomatic medial patellofemoral plica, impingement of the fat pad, and chondromalacia. He noted that he did not believe that the chondromalacia was a preexisting condition, and believed that it was caused by a direct blow to the anterior aspect of the knee. Dr. Wong stated that the working diagnosis at this point should include chondromalacia as well as the symptomatic medial patellofemoral plica and impingement of the fat pad. He continued to recommend an arthroscope of the knee, chondroplasty of the patella, excision of the medial pattelofemoral plica, and excision of the infrapatellar fat pad.

By decision dated February 19, 2014, OWCP denied modification of the earlier OWCP decisions, finding that the weight of the medical evidence still rested with the opinion of Dr. Heist.

In a report dated April 28, 2014, written in response to OWCP's decision dated February 19, 2014, Dr. Wong noted that he had conducted multiple extensive physical examinations of appellant's knees starting on October 6, 2011. He discussed her history of injury, history of medical examinations, and quoted a textbook on orthopedic medicine with regard to patellofemoral pain syndrome and chondromalacia of the patella. Dr. Wong noted that, after the left knee arthroscopic surgical intervention, appellant's left knee symptoms resolved and appellant has not had any complaints of pain. He noted that his impression as of March 20,

2014 was that she had a symptomatic medial patellofemoral plica in the right knee due to a fall on the knee which occurred at work. Dr. Wong noted that he injected appellant's knee. He wrote:

> "Please note that according to the above[-]reference[d] material that I have absolutely without a doubt diagnosed a medial patellofemoral plica when consideration of the patent's history as well as multiple physical examinations by myself and multiple treatments modalities have been treated accordingly and appropriately. Dr. Heist's evaluation however, which the report findings have based the denials have been based on a 'wastebasket' diagnosis provided by Dr. Heist. At this point, we have provided records of physical examination, MRI scan findings, subjective complaints from the patient, and a history of trauma to support my findings of a patellofemoral syndrome and impinging fat pad which require arthroscopic surgical resection of the plica. Dr. Heist's findings, however, are unfounded and I would appreciate if further consideration would be made in this appeal for surgical treatment of [appellant's] complaint of anterior knee pain due to symptomatic patellofemoral plica and impinging fat pad for which the patient had received similar treatment in her left knee due to an injury which occurred on the same day and due to the same mechanism and for which she has found significant relief due to the surgical intervention."

By letter dated June 16, 2014, counsel requested reconsideration again, this time from the decision dated February 19, 2014

By decision dated August 18, 2014, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommend by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.[2] OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.[3] The only limitation on OWCP's authority is that of reasonableness.[4]

Section 8123(a) provides that, if there is 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 an examination.[5] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion

[2] *Id*. at § 8103(a).

[3] *F.S.*, Docket No. 14-972 (issued October 15, 2014).

[4] *Daniel J. Perea*, 42 ECAB 214 (1999).

[5] 5 U.S.C. § 8123(a).

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 examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6]

ANALYSIS

On November 28, 2012 OWCP accepted that as a result of the July 8, 2011 employment injury, appellant suffered a sprain of the right knee (resolved as of September 24, 2012) and temporary aggravation of chondromalacia patellae, right knee (resolved September 24, 2012). However, it denied her requests for knee surgeries. OWCP determined that the record did not include a well-reasoned medical opinion explaining how the employment injury of July 8, 2011 caused or aggravated appellant's knee conditions and caused a need for surgical treatment.

OWCP has determined that the weight of the medical evidence was represented by the report of Dr. Heist, the second opinion physician. Dr. Heist opined that appellant's surgery on her left knee was for a preexisting condition of chondromalacia of the patella and was not related to her employment injury. He refers to an MRI scan report for the right knee dated July 8, 2011, which he alleged revealed evidence of preexisting chondromalacia of the patella. There is no MRI scan in the record dated July 8, 2011. An MRI scan of July 21, 2011 was interpreted by Dr. Prakash as evincing chondromalacia patella, but he did not indicate that this condition was preexisting. Dr. Prakash did note a patellar dislocation following a July 8, 2011 fall.

Dr. Wong, appellant's treating osteopath, strongly disagreed with Dr. Heist's opinion and diagnosed medial patellofemoral plica, right knee, due to the fall at work. He provided a detailed description of appellant's fall and noted that gravel was removed from appellant's knee at the emergency room visit on the date of the injury. Dr. Wong noted that she sustained a dislocated patella during her injury and that she injured her left knee at the same time. He reviewed the MRI scans by Drs. Prakash and Willis. Dr. Wong noted that appellant sustained intraarticular internal derangement of her knee as reported by MRI scan reports of July 21 and October 12, 2011. In his December 20, 2012 report, he noted that her July 21, 2011 MRI scan was interpreted by the radiologist as showing a strain pattern to the anterior crucial ligament but did not specifically state that there was anything underneath the knee. Dr. Wong noted that, when he independently reviewed the film, it showed that appellant had a hypertrophic fat pad and that she had a medial patellofemoral plica, which he believed had been injured when she fell directly onto her knee. He opined that within a reasonable degree of medical certainty her fall caused the damage to her knee, including the chondromalacia, noting that appellant had no prior complaints of pain and discomfort in her knee, that she did sustain direct trauma to her knee which resulted in a dislocation of the patella, that appellant continued to be in pain despite conservative care, and that the chondromalacia of the patella was most certainly related to the direct trauma. Dr. Wong indicated that his diagnoses and opinion on causation were supported by multiple physical examinations, subjective complaints from appellant, and a history of trauma. He noted she had significant relief from her first surgery.

[6] 20 C.F.R. § 10.321.

The Board finds that due to an outstanding conflict in the medical opinion evidence between appellant's physician, Dr. Wong, and the second opinion physician, Dr. Heist, regarding appellant's need for bilateral knee surgery, the case must be referred to an impartial medical specialist to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).[7] On remand, OWCP should refer appellant, along with the case file and the statement of accepted facts, to an appropriate impartial medical specialist for a determination with regard to appellant's request for knee surgeries. After such further development as OWCP deems necessary, it should issue a *de novo* decision regarding her claim.

CONCLUSION

The Board finds that this case is not in posture for decision with regard to appellant's request for coverage for bilateral knee surgeries.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for proceedings consistent with this decision.

Issued: October 6, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] *See F.S.*, Docket No. 14-1657 (issued November 17, 2014).