



residuals; and (2) whether appellant established that she had any continuing employment-related disability or condition after August 2, 2013 due to her accepted right knee condition.

On appeal, counsel asserts that OWCP did not meet its burden to terminate benefits because the statement of accepted facts (SOAF) was incorrect. He further maintains that the opinion of the referee specialist is not sufficiently rationalized to carry the weight of the medical evidence and that because he performed fitness-for-duty examinations for the employing establishment, his report should be excluded.

### **FACTUAL HISTORY**

On June 28, 2003 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 2003 she was injured when a heavy mail flat struck her right knee. She stopped work on June 26, 2003. On July 29, 2003 OWCP accepted that appellant sustained an internal derangement of the right knee (posterior horn of the right medial meniscus). Appellant was placed on the periodic compensation rolls.

In July 2003 appellant was treated by Dr. Monica Mehta, a Board-certified physiatrist. On December 15, 2003 Dr. Allen Glushakow, a Board-certified orthopedic surgeon, performed authorized arthroscopic surgery on the right knee. The postoperative diagnosis was partial tear of the anterior cruciate ligament and osteochondral fracture of the medial femoral condyle. OWCP additionally accepted closed fracture of right femoral condyle and other internal derangement of right knee.

In the ensuing years, OWCP referred appellant for a number of second opinion and impartial medical evaluations.<sup>3</sup> Appellant continued to receive wage-loss compensation.<sup>4</sup>

Dr. Mehta conducted a functional capacity evaluation on February 26, 2011. She determined that appellant could not perform duties of a letter carrier and was unable to return to work in any capacity because she was not capable of any lifting. On March 19, 2011 Dr. Mehta advised that appellant could work eight hours a day with indefinite physical restrictions. In reports dated March 26 to June 15, 2012, she advised that beginning in December 2008 appellant had severe complaints of radiating back pain. Dr. Mehta opined that, in addition to the accepted right knee condition, appellant's lumbosacral pain syndrome and left knee derangement were due to trauma sustained at work and as a result of the right knee injury.

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<sup>3</sup> Appellant was evaluated by Dr. I. Ahmad in April 2004, Dr. Paul A. Foddai in March 2005, Dr. David I. Rubinfeld in June 2006, Dr. Robert Dennis in May 2007, Dr. James A. Charles in May 2010, and Dr. Wayne J. Altman in June 2010. With the exception of Dr. Charles, a Board-certified neurologist, all physicians are Board-certified orthopedic surgeons.

<sup>4</sup> An April 5, 2012 investigative report from the employing establishment's Office of Inspector General advised that surveillance was conducted on appellant during the period December 2011 through March 2012 where she was observed and videotaped driving, walking, walking briskly, walking up and down steps, and bending with no apparent difficulty. The investigation also revealed that she was enrolled in and attended computer school. Attached exhibits included appellant's signed acknowledgement of rights, still photographs, surveillance video, appellant's resume, and a memorandum of interview.

In June 2012 OWCP referred appellant to Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 10, 2012 report, Dr. Lakin noted his review of the record, including a SOAF and video evidence. He provided physical examination findings and advised that, based on his evaluation, appellant was not disabled and was capable of performing her regular job as letter carrier for eight hours a day with no restrictions.<sup>5</sup>

OWCP determined that a conflict of medical opinion had been created between Dr. Mehta and Dr. Lakin regarding appellant's diagnosis and whether she had any continuing disability causally related to the June 18, 2003 employment injury. On December 6, 2012 it referred her to Dr. Arthur T. Canario, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Canario was also asked to address whether appellant's lumbar and left knee conditions were related to the work injury to her right knee.

In a January 7, 2013 report, Dr. Canario noted the history of injury, appellant's complaint of neck and back pain that radiated into her arms and legs, and his review of the record, including surveillance data. Physical examination findings included full range of motion of the cervical spine with negative Spurling's test, normal reflexes in both upper extremities, and no sensation loss, weakness, or atrophy. Straight-leg raising produced knee pain, but no back pain, and appellant had full lumbar range of motion when distracted. Right knee motion was from 0 to 140 degrees. There was no instability. Anterior and posterior draw test, Lachman's sign, pivot shift, McMurray, and Apley's signs were all negative. There was no effusion, synovial thickening, and no atrophy. Appellant complained of generalized, circumferential tenderness. Left knee examination demonstrated similar findings. Dr. Canario advised that her lumbar condition and left knee complaints were neither secondary to the employment injury nor due to any alteration of gait, noting that these could not be substantiated by clinical, objective findings. He noted that appellant did not have a meniscal tear, but a cruciate ligament tear and that she had been vastly over-treated and had little in the way of pathology. Dr. Canario opined that there was a large degree of symptom embellishment and that she should have returned to work approximately six weeks after the right knee arthroscopic procedure. He concluded that appellant could return to regular duty without restriction.

On March 14, 2013 OWCP proposed to terminate appellant's medical benefits and monetary compensation. It found that Dr. Canario's opinion that her work-related conditions had resolved was entitled to the special weight accorded a referee opinion.

Appellant, through counsel, disagreed with the proposed termination. Counsel maintained that Dr. Canario's opinion was speculative and further suggested that Dr. Canario had performed fitness-for-duty examinations for the employing establishment and was therefore disqualified from acting as a referee specialist. He attached employing establishment

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<sup>5</sup> Dr. Lakin's right knee examination demonstrated less than 3 degrees of extension to 120 degrees flexion; no medial or lateral joint line tenderness with minimal tenderness in the medial joint space and minimal effusion; negative McMurray's test, patellofemoral grind, patellofemoral crepitus, patellofemoral apprehension, Apley's compression, and decompression tests; no atrophy of the quadriceps or hamstrings; no anterior or posterior varus or valgus instability. Distal neurological status was intact with no signs of peripheral nerve entrapment. Quadriceps and hamstring strength was 5/5.

correspondence indicating that a fitness-for-duty examination had been scheduled with Dr. Canario on March 30, 2001.<sup>6</sup>

In a March 22, 2013 report, Dr. Mehta noted appellant's continued complaints of radiating cervical and low back pain. She again maintained that appellant's back and left knee condition were secondary to the right knee injury, noting that she continued to have complaints of pain because of the imbalance of the pelvis secondary to the disturbed pelvic obliquity resulting from bilateral knee internal derangement. Dr. Mehta noted her disagreement with the findings of the referee physician. On a work capacity evaluation dated April 2, 2013, she indicated that appellant was restricted to sitting, walking, standing, reaching, bending, stooping, and operating a motor vehicle to 15 minutes, noting that she was unable to stand or walk without pain. An April 5, 2013 magnetic resonance imaging (MRI) scan study of the right knee demonstrated mild-to-moderate tricompartment chondromalacia with old osteochondral injuries and early subchondral degenerative cysts.

On work capacity evaluations dated April 24 and May 9, 2013, Dr. Canario advised that appellant could return to work without restriction. On May 9, 2013 he advised that her torn meniscus was removed arthroscopically and was therefore no longer present and that any residual symptoms would not prevent her from performing letter carrier duties. Dr. Canario further indicated that he last evaluated an employee of the employing establishment on September 21, 2012. On June 28, 2013 he indicated that he performed a "fitness-for-duty" evaluation for the employing establishment, at the request of OWCP, on September 21, 2012. On July 12, 2013 Dr. Canario clarified this to indicate that the evaluation done on September 21, 2012 was an impartial evaluation for OWCP and not at the behest of the employing establishment. He noted that he last performed an evaluation requested by the employing establishment on June 7, 2007.

By decision dated August 1, 2013, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Canario who performed the referee examination and finalized the termination of benefits.

Appellant, through counsel, timely requested a hearing. At the hearing, held on November 8, 2013, she testified that she began work as a letter carrier in 2002. Appellant described her job duties and the June 18, 2003 employment injury. She stated that, shortly after the injury, in addition to right knee pain and swelling, she developed back pain that had continued. Appellant stated that she could now walk for one-half hour on flat terrain, but was limited in bending, stooping, and climbing stairs, and could not lift due to her back. She maintained that she could not perform letter carrier duties and had been diagnosed with S1 radiculopathy and left knee problems which, she felt, were due to the right knee injury. Counsel asserted that Dr. Canario's report contained inconsistencies and that, as he had performed fitness-for-duty evaluations for the employing establishment, his report should be excluded. He indicated that he would forward a November 6, 2013 report from Dr. Mehta.

In a January 15, 2014 decision, an OWCP hearing representative affirmed the August 1, 2013 decision. He found that because Dr. Canario had last performed a fitness-for-duty

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<sup>6</sup> The correspondence does not indicate that this appointment was for appellant.

examination for the employing establishment more than five years prior to examining appellant, he did not regularly perform fitness-for-duty examinations and therefore his evaluation was proper. The hearing representative found Dr. Canario's evaluation was well rationalized and entitled to the special weight of an impartial specialist.

In correspondence dated January 6, 2014, received by OWCP on January 16, 2016, counsel forwarded a November 6, 2013 report in which Dr. Mehta described appellant's medical and surgical history. Dr. Mehta indicated that, subsequent to the employment injury, appellant had multiple orthopedic and neurologic problems including lumbar and cervical disc herniations, cervical and lumbosacral radiculopathy, and left knee derangement. She reiterated that, due to the right knee injury, appellant had a pelvic imbalance that caused a spinal abnormality with lumbosacral radiculopathy and an indirect lumbar disc herniation. Dr. Mehta indicated that appellant could only perform light-duty work. Also forwarded was a March 30, 2012 lumbar MRI scan that demonstrated L4-5 and L5-S1 spinal stenosis with disc herniation and disc bulging, and degenerative disc disease. A July 9, 2012 left knee MRI scan demonstrated mild tricompartment osteoarthritis, a partial anterior cruciate ligament tear, and medial meniscal degenerative change and tear, tendinitis, effusion, and a small Baker's cyst.

On May 16, 2014 appellant, through counsel, requested reconsideration. Counsel noted that Dr. Mehta's November 6, 2013 report had not been reviewed by the hearing representative.

In a merit decision dated September 12, 2014, OWCP denied modification of the prior decisions. It reviewed the evidence submitted and determined that the November 6, 2013 report from Dr. Mehta, who had been on one side of the conflict in medical evidence, was insufficient to overcome the special weight accorded Dr. Canario or to create a new conflict.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.<sup>9</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

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<sup>7</sup> *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> *T.P.*, 58 ECAB 524 (2007).

shall appoint a third physician who shall make an examination.<sup>10</sup> The implementing regulations 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 examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>11</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup>

The Board has long recognized the importance of the impartiality of the physician selected as an impartial medical specialist.<sup>13</sup> In selecting an impartial medical specialist, the physician so designated should be one who is wholly free to make a completely independent evaluation and judgment.<sup>14</sup> A physician performing fitness-for-duty examinations for the employing establishment may undermine the appearance of impartiality and disqualify the physician from serving as an impartial medical specialist.<sup>15</sup> OWCP procedures acknowledge that medical evidence must be excluded when "the physician selected for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment."<sup>16</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on August 1, 2013. The accepted conditions in this case are internal derangement of the right knee (posterior horn of the right medial meniscus), closed fracture of right femoral condyle, and other internal derangement of right knee. OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Mehta, an attending physiatrist, and Dr. Lakin, an OWCP referral orthopedic surgeon, regarding whether appellant continued to be disabled due to the June 18, 2003 employment injury. It referred her to Dr. Canario, Board-certified in orthopedic surgery, for an impartial medical evaluation.

Counsel asserted on appeal that the SOAF was incorrect because it did not indicate that appellant's December 15, 2003 surgery was authorized. While the SOAF did not specifically

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<sup>10</sup> 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *V.G.*, 59 ECAB 635 (2008).

<sup>13</sup> *See George W. Coast*, 36 ECAB 600 (1985).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *see also Steve A. Williams*, 53 ECAB 772 (2002).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.12.1(a) (September 2010); *see also* Part 3 -- Medical, *OWCP Referee Examinations*, Chapter 3.500.4.b(3) (July 2011).

indicate that her right knee surgery was authorized, OWCP procedures do not indicate that an essential element of a SOAF is a recitation of medical treatment, whether authorized or not.<sup>17</sup>

As to counsel's assertion on appeal that Dr. Canario's report should be excluded because he had performed fitness-for-duty examinations for the employing establishment, the record reflects that Dr. Canario had last completed a fitness-for-duty examination for the employing establishment on June 7, 2007 more than five years prior to his January 7, 2013 evaluation of appellant. As noted above, OWCP procedures acknowledge that medical evidence must be excluded when the physician selected for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment.<sup>18</sup> The Board finds that in this case, as Dr. Canario had not performed a fitness-for-duty examination for the employing establishment since 2007, he is not "regularly involved" and therefore his report need not be excluded.<sup>19</sup>

In his January 7, 2013 report, Dr. Canario noted his review of the SOAF and medical records. He described the history of injury and appellant's complaints of radiating neck and low back, and bilateral knee pain. Dr. Canario performed a thorough physical examination. He advised that appellant's lumbar condition and left knee complaints were either secondary to the employment injury or to any alteration of gait, noting that these could not be substantiated by clinical, objective findings. Dr. Canario noted that she did not have a meniscal tear, but a cruciate ligament tear and that she had been vastly over-treated and had little in the way of pathology. He opined that there was a large degree of symptom embellishment, and appellant should have returned to work approximately six weeks after the right knee arthroscopic procedure. Dr. Canario concluded that she could return to regular duty without restriction. On work capacity evaluations dated April 24 and May 9, 2013, he advised that appellant could return to work without restriction. On May 9, 2013 Dr. Canario advised that her tear was removed arthroscopically and was therefore no longer present and that any residual symptoms would not prevent her from performing letter carrier duties. He further indicated that he last evaluated an employee of the employing establishment on September 21, 2012.

The Board finds that Dr. Canario provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of appellant's accepted right knee conditions had resolved and that she could return to her letter carrier duties. Dr. Canario's opinion is therefore

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<sup>17</sup> *Id.* at Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.5 (September 2009). See *Lan Thi Do*, 46 ECAB 366 (1994).

<sup>18</sup> *Supra* note 16.

<sup>19</sup> See *Christine L. Trowbridge*, Docket No. 88-1625 (issued May 3, 1989) (physician who examined one postal worker every month or so would not disqualify a physician from serving as an impartial medical specialist; see also FECA Bulletin 86-10 (issued December 16, 1985) (three or four fitness-for-duty examinations per year would not disqualify a physician from serving as an impartial medical specialist); compare *Steve A. Williams*, *supra* note 15 (three fitness-for-duty examination performed in a four-month period prior to impartial evaluation sufficient to exclude impartial medical specialist).

entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.<sup>20</sup>

The medical evidence appellant submitted in response to the proposed termination is insufficient to overcome the special weight accorded Dr. Canario as an impartial medical specialist regarding whether she had residuals of her accepted conditions. In reports dated March 22 and April 2, 2013 merely reiterated her findings and conclusions and noted her disagreement with his opinion. The Board has long held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.<sup>21</sup> Dr. Mehta had been on one side of the conflict resolved by Dr. Canario. Furthermore, she did not specifically explain why the accepted right knee conditions caused appellant's total disability.

The Board therefore concludes that Dr. Canario's opinion that appellant had recovered from the employment injury and could return to regular duty is entitled to the special weight accorded an impartial medical examiner,<sup>22</sup> and the additional medical evidence submitted is insufficient to overcome the weight accorded him as an impartial medical specialist regarding whether she had residuals of her accepted conditions. OWCP therefore properly terminated her compensation benefits on August 1, 2013.<sup>23</sup>

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

As OWCP met its burden of proof to terminate appellant's compensation benefits on August 1, 2013, the burden shifted to her to establish that she had any continuing disability causally related to her accepted right knee injury.<sup>24</sup> Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>25</sup>

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

The Board finds that appellant submitted insufficient medical evidence with her May 16, 2014 reconsideration request to establish that she continued to be disabled after August 1, 2013 due to the June 18, 2003 injury accepted for internal derangement of the right knee (posterior

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<sup>20</sup> *Supra* note 12.

<sup>21</sup> *I.J.*, 59 ECAB 408 (2008).

<sup>22</sup> *Supra* note 12.

<sup>23</sup> *Id.*

<sup>24</sup> *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>25</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

horn of the right medial meniscus), closed fracture of right femoral condyle, and other internal derangement of right knee.

The MRI scan studies of the left knee and lumbar spine are irrelevant as neither a left knee nor a lumbar condition has been accepted as employment related. In the November 6, 2013 report, Dr. Mehta essentially repeated the content of prior reports, her findings, and opinions. As noted above, reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.<sup>26</sup> Dr. Mehta had been on one side of the conflict resolved by Dr. Canario. As such, this report is insufficient to establish that appellant continued to be disabled after August 1, 2013 due to the accepted right knee conditions.<sup>27</sup>

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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 1, 2013 and that she did not establish that she had any continuing employment-related disability after that date causally related to the June 18, 2003 employment injury.

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<sup>26</sup> *Supra* note 21.

<sup>27</sup> *S.S.*, 59 ECAB 315 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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