



## ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for bilateral knee surgeries.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 11, 2011 appellant, then a 35-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) 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 knee and further undetermined injuries. Appellant did not report that she had stopped work.<sup>4</sup>

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). By decision of even date, it denied her request for right knee surgical excision of plica and fat pad.<sup>5</sup>

In an October 6, 2011 report, Dr. Jason Wong, appellant's treating osteopath, diagnosed impingement of the medial patellofemoral joint plica or medial meniscal tear of the right knee. He also noted that she might have similar conditions of the left knee, but not to the same extent. On December 12, 2011 Dr. Wong 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. In a February 26, 2012 report, he diagnosed symptomatic patellofemoral plica and impinging fat pad literally. Dr. Wong opined that appellant's bilateral knee conditions were caused and precipitated by her employment injury. He 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. Dr. Wong noted that appellant required further physical therapy and strengthening of her left knee and required surgical intervention due to the continued pain in her right knee.

On September 4, 2012 OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. In a September 19,

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<sup>3</sup> Docket No. 15-0321 (issued October 6, 2015).

<sup>4</sup> OWCP initially denied appellant's claim on October 3, 2011 as she had not established fact of injury. On October 12, 2011 appellant requested a hearing before an OWCP hearing representative. By decision dated May 10, 2012, OWCP's hearing representative found that the evidence of record established that the incident occurred as alleged. He remanded the case to OWCP for further development of the medical evidence to determine whether appellant sustained bilateral knee conditions causally related to the accepted employment incident.

<sup>5</sup> Appellant continued to submit additional medical evidence and requested further review of the denial of her request for surgical authorization. OWCP denied modification of its November 28, 2012 decision by decisions dated May 31 and October 31, 2013, and February 19 and August 18, 2014.

2012 report, Dr. Heist reviewed appellant's employment history and medical records, and conducted a physical examination. He opined that her only positive findings were related to her preexisting condition of right knee chondromalacia of the patella and were not related to her July 8, 2011 fall. Dr. Heist opined that appellant temporarily aggravated her preexisting condition, which had since resolved. He concluded that appellant subsequently had a lateral release performed in her left knee, but that this procedure was done for the preexisting condition of chondromalacia patella and was not related to her work injury.

Appellant continued to submit reports by Dr. Wong. In an April 2, 2013 report, Dr. Wong noted that he disagreed with Dr. Heist's finding that appellant had preexisting chondromalacia, and that if she did, the injury at work aggravated the preexisting chondromalacia. He noted that appellant sustained a dislocated right patella during her injury and that she also injured her left knee at the same time. In an August 14, 2013 report, Dr. Wong noted his continued disagreement with Dr. Heist. He discussed a new magnetic resonance imaging scan and his treatment of appellant. Dr. Wong opined within a reasonable degree of certainty that appellant's employment injury caused the damage to her right knee including chondromalacia. He recommended that she undergo right knee arthroscopy to excise the intrapatellar fat pad of the plica.

On November 25, 2014 appellant appealed to the Board. By decision dated October 6, 2015, the Board set aside the November 28, 2012 denial of authorization for surgery and remanded the case for further development of the medical evidence. The Board found that there was an outstanding conflict in the medical evidence between appellant's physician, Dr. Wong, and the second opinion physician, Dr. Heist, regarding appellant's need for bilateral knee surgery.<sup>6</sup>

Appellant continued to submit treatment notes relating Dr. Wong's treatment for symptomatic medial patellofemoral plica with impinging fat pad of the right knee on September 10, 2015. In a January 28, 2016 note, Dr. Wong indicated that on July 18, 2016 appellant had undergone an arthroscopy of the right knee with excision of plica, excision of fat pad, and lateral retinacular release.

On August 19, 2016 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Wong and Dr. Heist as to whether appellant's bilateral knee surgeries should be authorized. In a September 9, 2016 report, Dr. Askin reviewed appellant's employment history, medical history, and history of injury. In response to OWCP's questions regarding appellant's right knee, Dr. Askin noted that there was no clinical evidence of a right knee partial ligament tear at the present time. Regarding temporary aggravations of chondromalacia patellae, he determined that he had no reason to doubt that appellant had some discomfort associated with the reported occurrence with such discomfort labeled as temporary aggravation, but that five years later, there was no clinical evidence of a continuing temporary aggravation.

Dr. Askin opined that appellant's bilateral knee surgeries had no causal nexus to the reported incident. He explained that the right knee surgery performed by Dr. Wong on January 28, 2016 was not medically necessary. Regarding the right knee surgery, Dr. Askin explained that surgical treatment could be necessary if the patient would suffer some compromise in the absence

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<sup>6</sup> *Supra* note 3.

of treatment. However significant pause was necessary when considering arthroscopic knee treatment because it was not reconstructive, but rather only ablative treatment. Dr. Askin further explained that removing tissue was not therapeutic unless the tissue removed was the cause of symptoms. He opined that appellant's right knee procedure left her no better off than if her condition had been left untreated.

Dr. Askin also related that the December 12, 2011 left knee surgery was medically unnecessary, noting that there was no condition identified for which surgery would provide relief. He noted that from a purely musculoskeletal basis, the manner in which appellant sought and received treatment for her knees was unexpected given the paucity of identified pathology within both of her knees. Dr. Askin explained that upon appellant's initial presentation after the injury, there was no identified significant traumatic pathology identified. While he did not rule out all imperfection, there were no findings of significance and no condition that required surgical intervention. Dr. Askin concluded that appellant had surgical treatments that did not address any condition or pathology caused by the July 8, 2011 incident.

By decision dated November 22, 2016, OWCP denied authorization for bilateral knee surgeries. It determined that the weight of the medical evidence was represented by the report of the impartial medical examiner, Dr. Askin.

By letter received by OWCP on November 29, 2016, appellant, through counsel, requested a hearing. During the hearing held on March 2, 2017, counsel argued that the questions presented to Dr. Askin were unclear or in dispute. He contended that Dr. Askin's report was not sufficiently well reasoned to carry the weight of the evidence. Counsel further contended that Dr. Askin spoke in generalities and did not explain the reasons for his conclusions.

By decision dated April 4, 2017, the hearing representative affirmed OWCP's November 22, 2016 decision. He found that the weight of the medical evidence rested with the opinion of the impartial medical examiner, Dr. Askin.

### **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 recommended 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.<sup>7</sup> OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.<sup>8</sup> The only limitation on OWCP's authority is that of reasonableness.<sup>9</sup>

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<sup>7</sup> 5 U.S.C. § 8103(a).

<sup>8</sup> *F.S.*, Docket No. 14-0972 (issued October 15, 2014).

<sup>9</sup> *Daniel J. Perea*, 42 ECAB 214 (1999).

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.<sup>10</sup> The implementing regulations state 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> In situations where 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>

### ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of bilateral knee surgeries.

OWCP accepted that, as a result of a fall while working for the employing establishment on July 11, 2011, appellant sustained a sprain of the right knee (resolved as of September 24, 2012) and a temporary aggravation of chondromalacia patellae of the right knee (resolved as of September 24, 2012).

Appellant was treated by Dr. Wong. On December 12, 2011 Dr. Wong performed an arthroscopy of appellant's left knee with excision of medial and lateral patellofemoral plica and excision of fat pad with the lateral retinacular release and an injection. On January 18, 2016 he performed an arthroscopy of the right knee with excision of plica, excision of fat pad, and lateral retinacular release. Dr. Wong diagnosed symptomatic patellofemoral plica and impinging fat pad of bilateral knees. He opined that these conditions were caused by her employment injury.

OWCP referred appellant to Dr. Heist for a second opinion. Dr. Heist diagnosed status postoperative arthroscopic surgery of the left knee, excision of fat pad, plica, and lateral release (not work related) and sprain right knee and aggravation of patella chondromalacia (preexisting). He concluded that appellant's lateral release on her left knee was done to treat her preexisting condition of chondromalacia patella and was not related to her work injury. Dr. Heist explained that she had temporary aggravation of her preexisting right knee chondromalacia of the patella, but the condition had since resolved.

The Board determined that a conflict existed in the medical opinion evidence which required referral to an impartial medical examiner.

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<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *V.B.*, Docket No. 16-1684 (issued December 8, 2017).

In order to resolve the conflict between Dr. Wong and Dr. Heist, OWCP referred appellant to Dr. Askin for an impartial medical examination. In a September 9, 2016 report, Dr. Askin accurately reviewed appellant's history of injury and her medical history. He noted that her knee complaints had not been satisfactorily addressed by Dr. Wong, and despite her surgeries, she had continuing complaints. With regard to these surgeries, Dr. Askin noted that significant pause was necessary when considering arthroscopic knee surgery because such treatment was not reconstructive, but ablative. He opined that unless there was some assurance that the tissue removed was the cause of symptoms, such removal by excision or shaving was not therapeutic. Dr. Askin indicated that the surgery performed by Dr. Wong on January 28, 2016 did not produce better results than if her condition had been left untreated. Therefore, he concluded that the surgery was medically unnecessary. With regard to the December 12, 2011 left knee surgery, Dr. Askin opined that appellant's condition did not require surgery. As appellant never had any such imperfection in either knee, he concluded that this surgery was also medically unnecessary.

Based on the evidence of record, the Board finds that OWCP did not abuse its discretion by denying appellant's request for authorization of her bilateral knee surgeries. OWCP appropriately determined that the weight of the medical evidence was represented by the well-rationalized report of the impartial medical examiner, Dr. Askin.<sup>13</sup> The only limitation on OWCP's authority in approving or disapproving service under FECA is one of reasonableness.<sup>14</sup> Dr. Askin clearly opined that the requested surgeries were not medically necessary for treatment of appellant's accepted injury. OWCP, therefore, had sufficient evidence upon which it based its decision to deny the surgeries and did not abuse its discretion.

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 did not abuse its discretion by denying appellant's requests for bilateral knee surgeries.

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<sup>13</sup> A.S., Docket No. 17-1088 (issued December 4, 2017).

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 4, 2017 is affirmed.

Issued: June 7, 2018  
Washington, DC

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

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

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