

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

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<b>K.C., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 23-0128</b>
	)	<b>Issued: July 18, 2023</b>
<b>DEPARTMENT OF THE ARMY, TOOELE</b>	)	
<b>ARMY DEPOT, Tooele, UT, Employer</b>	)	

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 3, 2022 appellant filed a timely appeal from a September 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective September 28, 2022, as he no longer had disability casually related to his accepted July 14, 1980 employment injury.

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<sup>1</sup> The Board notes that, following the September 28, 2022 decision and on appeal, appellant submitted additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

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

On July 14, 1980 appellant, then a 25-year-old mechanics helper, filed a traumatic injury claim (Form CA-1) alleging on that date he injured his right knee while in the performance of duty. He stopped work on that date. OWCP accepted the claim for dislocation of the right patella and temporary aggravation of chondromalacia. Appellant returned to light-duty work on January 29, 1981 and sustained a recurrence of total disability on June 1, 1981. OWCP paid wage-loss compensation on the periodic rolls beginning May 31, 1982.

On March 2, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), and series of questions for a second opinion evaluation with Dr. Leslie J. Harris, a Board-certified orthopedic surgeon, to determine appellant's work-related disability and medical residuals due to his July 14, 1980 employment injury.

In a March 16, 2017 report, Dr. Harris reviewed the SOAF and medical records and performed a physical examination. He opined that only a small portion of appellant's current symptoms were secondary to patellofemoral arthritis which developed as a consequence of the original patellar dislocation and chondromalacia of the patella. Dr. Harris opined that, due to appellant's work-related patellofemoral arthritis and appellant's additional lateral and medial compartmental right knee arthritis, appellant was unable to return to his date-of-injury position as he could not stoop, squat, kneel, or crawl for extended periods. He also provided restrictions on walking or standing for eight hours and lifting over 50 pounds.

On August 4, 2021 OWCP requested that appellant provide a medical report from his attending physician within 30 days. No response was received.

On December 22, 2021 OWCP referred appellant, a SOAF and a series of questions to Dr. Qing-Min Chen, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated January 31, 2022, Dr. Chen recounted appellant's history of work-related right knee injury in 1980. He reviewed the SOAF and medical treatment. Dr. Chen diagnosed work-related right patellofemoral post-traumatic osteoarthritis, dislocation of the right patella and temporary aggravation of chondromalacia of the right patella as well as nonwork-related right knee medial and lateral compartment osteoarthritis. He opined that the work-related patella injury caused patellofemoral post-traumatic osteoarthritis, but that the medial and lateral right knee compartments should not have been affected. Dr. Chen found no right knee instability and concluded that this suggested that appellant's main issue was likely due to his osteoarthritic changes of the right knee medial and lateral compartments. He advised that appellant's accepted work-related conditions had not resolved and that appellant's patellofemoral post-traumatic osteoarthritis would not resolve until he underwent a total knee replacement. Dr. Chen emphasized that the patellofemoral joint was only one-third of the knee and that the other two-thirds of appellant's knee, the medial and lateral joints, were also osteoarthritic, but not work related. He

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<sup>3</sup> Docket No. 02-2297 (issued April 11, 2003).

concluded that appellant could return to his date-of-injury position as appellant's right knee pain was largely attributable to the medial and lateral compartments, while appellant's patellofemoral osteoarthritis only made up a minor component of his right knee pain and arthritis.

In a notice dated February 9, 2022, OWCP proposed to terminate appellant's wage-loss compensation because he no longer had disability or residuals causally related to his accepted employment injury. It based its proposed finding on Dr. Chen's opinion that appellant was no longer disabled and could return to work. OWCP afforded appellant 30 days to submit additional evidence or argument challenging the proposed termination.

By decision dated March 14, 2022, OWCP terminated appellant's wage-loss compensation, effective that date. It based its finding on Dr. Chen's January 31, 2022 second opinion report opining that appellant no longer had any disability due to his accepted employment injury. On April 7, 2022 appellant requested a review of the written record from a representative of OWCP's Branch of Hearings and Review.

By decision dated June 29, 2022, OWCP's hearing representative reversed the March 14, 2022 termination decision finding that Dr. Chen's January 31, 2022 report did not sufficiently explain how appellant could return to his date-of-injury position. He further noted that Dr. Chen had opined that appellant's patellofemoral osteoarthritis made up only a minor component of appellant's right knee pain and that this focus on the percentage of disability suggested that he was unaware that there was no apportionment under FECA.

On July 1, 2022 OWCP requested that Dr. Chen provide additional medical rationale supporting his opinion that appellant was no longer disabled from work. In a July 8, 2022 supplemental report, Dr. Chen recounted that appellant's employment injury was accepted for right knee patella chondromalacia secondary to dislocation of the patella. He explained that the knee has three compartments, and that appellant's main issue was pain in his right knee attributable to arthritic changes in the medial and lateral compartments of the right knee, rather than the patellofemoral compartment. Dr. Chen opined that appellant's patellofemoral osteoarthritis only made up a minor component of his right knee pain and arthritis. He also reported that there were no objective findings of instability. Dr. Chen described the job duties of a heavy mobile equipment mechanic helper including moderate physical effort with the need for occasional lifting up to 75 pounds. He concluded that the pain in appellant's right knee was not coming from the patellofemoral joint, but from the other two compartments of the right knee which were not accepted as employment related.

In a notice dated August 18, 2022, OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Chen's opinion that appellant was no longer disabled and could return to work. It afforded appellant 30 days to submit additional evidence or argument challenging the proposed termination.

In a narrative statement, appellant alleged that Dr. Chen did not perform a thorough examination.

By decision dated September 28, 2022, OWCP terminated appellant's wage-loss compensation, effective that date, based on Dr. Chen's second opinion report.

## LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>4</sup> After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

## ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective September 28, 2022.

In his July 8, 2022 supplemental second opinion report, Dr. Chen noted his review of appellant's medical history and indicated that appellant's physical examination revealed objective findings of tricompartmental right knee osteoarthritis. However, he attributed appellant's disability from work as due to lateral and medial compartment osteoarthritis and found that the accepted condition of patellofemoral osteoarthritis only made up a minor component of his right knee pain and arthritis. Dr. Chen also opined that the pain in the right knee was not coming from the patellofemoral joint and that appellant's accepted employment injury did not prevent his return to his date-of-injury position.

The Board finds that Dr. Chen's opinion does not comport with the requirements of FECA, and does not contain sufficient medical reasoning to establish that appellant no longer had disability due to his accepted employment injury.<sup>7</sup> There is no apportionment under FECA.<sup>8</sup> Any contribution to appellant's disability by the accepted condition would render his disability compensable.<sup>9</sup> The factors that, determine probative medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issue addressed to him by OWCP.<sup>10</sup> Therefore,

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<sup>4</sup> See *B.L.*, Docket No. 22-0812 (issued December 29, 2022); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> See *B.L.*, *id.*; *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *B.L. id.*; *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *A.G.*, Docket No. 20-0187 (issued December 31, 2020); see *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

<sup>8</sup> *M.M.*, Docket No. 20-1524 (issued April 20, 2021); *J.B.*, Docket No. 17-2021 (issued August 8, 2018); *G.G.*, Docket No. 17-0504 (issued August 8, 2017); *Beth C. Chaput*, 37 ECAB 158 (1985) (it is not necessary to show a significant contribution of employment factors to a diagnosed condition to establish causal relationship).

<sup>9</sup> *Id.*

<sup>10</sup> *B.L.*, *supra* note 4; *James T. Johnson*, 39 ECAB 1252 (1988).

Dr. Chen's second-opinion report is of diminished probative value. The Board thus finds that OWCP failed to meet its burden of proof.<sup>11</sup>

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective September 28, 2022.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 28, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 18, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> *Id.*