

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

S.T., Appellant)	
)	
and)	Docket No. 21-0611
)	Issued: September 22, 2023
U.S. POSTAL SERVICE, NETWORK)	
DISTRIBUTION CENTER, Richmond, CA,)	
Employer)	
)	

Appearances:

Sylvia R. Johnson, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 3, 2021 appellant, through her representative, filed a timely appeal from a December 14, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 14, 2021 decision, appellant submitted additional evidence to the Board. However, the Board's *Rules of Procedures* 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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 16, 2020, as she no longer had disability or residuals causally related to her accepted right knee conditions; and (2) whether appellant has met her burden of proof to establish continuing disability and residuals on or after June 16, 2020 due to her accepted right knee conditions.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ 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 January 20, 2006 appellant, then a 42-year postal clerk, filed an occupational disease claim (Form CA-2) alleging that she experienced an aggravation of right knee pain due to factors of her federal employment. She noted that she first became aware of her condition on April 23, 2005 and realized its relationship to her federal employment on December 16, 2005. On the reverse side of the claim form, the employing establishment indicated that appellant was working modified duty due to a previous work injury.⁵ Appellant did not stop work. By decision dated April 27, 2006, OWCP accepted the claim for temporary aggravation of right knee bursitis. It subsequently expanded the acceptance of the claim to include right knee enthesopathy. OWCP paid appellant wage-loss compensation.

In reports dated August 16 and October 10, 2016, Dr. Vatche Cabayan, a Board-certified orthopedic surgeon, recounted appellant's complaints of problems with her right and left knees. He noted examination findings of weakness to resisted function, extension to 180 degrees, and flexion to 100 degrees. Dr. Cabayan diagnosed right knee bursitis and reported that appellant could perform sedentary-type work.

In reports dated February 6 through August 15, 2017, Dr. Cabayan reported that appellant had developed "not only bursitis, but also chondromalacia of patella related to her activities on the job." He explained that appellant's diagnosis was documented erroneously, and that appellant's chondromalacia had not resolved. Dr. Cabayan diagnosed right knee bursitis and noted that appellant could work sedentary duty. He continued to treat appellant and provided reports dated September 6, 2017 through May 21, 2019.⁶

In reports dated November 19, 2019 through March 11, 2020, Dr. Cabayan described appellant's history of injury and recounted her complaints of constant pain, motion loss, buckling,

⁴ Docket No. 13-1722 (issued November 20, 2013).

⁵ Appellant has a previously accepted traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx056 for a lumbar strain causally related to a September 13, 2005 employment incident. OWCP has not administratively combined that claim with the present claim.

⁶ On December 26, 2017 appellant filed another Form CA-2 alleging that she developed left knee chondromalacia because of compensating for her accepted right knee condition. OWCP assigned OWCP File No. xxxxxx636 to the new occupational disease claim. On August 9, 2019 it administratively combined File Nos. xxxxxx636 and xxxxxx616, with the latter claim as the master file.

limping, and inability to walk. He diagnosed right knee bursitis and recommended that appellant work sedentary duty.

On December 23, 2019 OWCP referred appellant to Dr. John H. Welborn, a Board-certified orthopedic surgeon, for a second-opinion examination to determine whether the acceptance of appellant's claim should be expanded to include right knee chondromalacia and the status of her ability to work.⁷ In a February 10, 2020 report, Dr. Welborn indicated that he had reviewed the SOAF and noted that appellant's claim was accepted for aggravation of right knee bursitis and right knee enthesopathy. Upon examination of appellant's right knee, he observed tenderness medially and no swelling or erythema. Range of motion testing revealed flexion to 95 degrees and extension to 5 degrees. Dr. Welborn diagnosed right and left knee arthritis. In response to OWCP's questions, he responded that appellant's work-related conditions of knee sprain, bursitis, and enthesopathy had resolved. Dr. Welborn reported that appellant suffered from knee arthritis, which was related to her severe obesity and not her work. He indicated that appellant's work restrictions were not due to her work-related injury and completed a Form OWCP-5c, which indicated that appellant could perform sedentary-duty work.

On March 25, 2020 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits because the medical evidence of record had established that her accepted right knee conditions had resolved. It noted that Dr. Welborn, OWCP's second-opinion examiner, had found in the February 10, 2020 report that she no longer had any disability or residuals causally related to her accepted right knee conditions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

Appellant subsequently submitted a March 19, 2020 right knee MRI scan, which revealed early degenerative changes with subchondral edema changes, medial meniscal tear, sprain of the anterior cruciate ligament, Baker's cyst, small joint effusion, and Grade 1 chondromalacia patella.

In an April 13, 2020 report, Dr. Cabayan indicated that he evaluated appellant for complaints of constant bilateral knee pain, motion loss, buckling, limping, and inability to walk. He discussed her history of injury and reiterated that she should have been diagnosed with chondromalacia, instead of bursitis. Dr. Cabayan opined that appellant's chondromalacia was aggravated by her work and had not resolved.

By decision dated June 16, 2020, OWCP finalized the proposed termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of medical evidence rested with Dr. Welborn, OWCP's second-opinion examiner, who determined in a February 10, 2020 report, that appellant did not have disability or residuals due to her accepted right knee conditions.

⁷ The Board notes that OWCP previously undertook development of the issues of whether appellant's accepted conditions had resolved and whether the acceptance of the claim should be expanded to include chondromalacia. OWCP found a conflict in the medical opinion evidence and referred appellant to Dr. Michael Oechsel, a Board-certified orthopedic surgeon, for an impartial medical examination. It subsequently issued a notice of proposed termination on December 15, 2019. However, OWCP determined that a new second opinion evaluation was necessary due to the age of the medical evidence.

On June 24, 2020 appellant, through her representative, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 8, 2020.

Appellant submitted reports dated June 16 through November 17, 2020 by Dr. Cabayan, which repeated the findings contained in the April 13, 2020 report. Dr. Cabayan indicated that he examined appellant and noted her complaints of constant pain, motion loss, buckling, limping, and inability to walk. He conducted an examination and diagnosed right knee bursitis, right knee grade 1 chondromalacia along the patella, right knee meniscal tear, right knee Baker's cyst, left knee medial and lateral meniscus tear, left knee chondromalacia, and left knee moderate degenerative changes. Dr. Cabayan indicated that appellant could work sedentary duty.

By decision dated December 14, 2020, OWCP's hearing representative affirmed the June 16, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of benefits.⁸ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁹ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹¹ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition, which require further medical treatment.¹²

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician, known as a referee physician or impartial medical examiner (IME), who shall make an examination.¹³ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ When OWCP has referred the case to an IME for the purpose of resolving the

⁸ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁹ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹⁰ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹¹ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹² *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹³ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹⁴ 20 C.F.R. § 10.321.

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 16, 2020.

On December 23, 2019 OWCP referred appellant to Dr. Welborn for a second-opinion examination to determine whether appellant's claim should be expanded to include right knee chondromalacia and the status of her ability to work. In a February 10, 2020 report, Dr. Welborn indicated that he had reviewed the SOAF and noted that appellant's claim was accepted for aggravation of right knee bursitis and right knee enthesopathy. Upon examination of appellant's right knee, he observed tenderness medially and no swelling or erythema. Dr. Welborn diagnosed right and left knee arthritis. In response to OWCP's questions, he responded that appellant's work-related conditions had resolved. Dr. Welborn reported that appellant suffered from knee arthritis, which was related to her severe obesity and not to her work. He indicated that appellant's work restrictions were not due to her work-related injury and completed a Form OWCP-5c, which indicated that appellant could perform sedentary-duty work.

Dr. Cabayan, on the other hand, in an April 13, 2020 report, indicated that he evaluated appellant for complaints of constant bilateral knee pain, motion loss, buckling, limping, and inability to walk. He discussed her history of injury and reiterated that she should have been diagnosed with chondromalacia, instead of bursitis. Dr. Cabayan opined that appellant's chondromalacia was aggravated by her work and had not resolved.

The Board, therefore, finds that there remains an unresolved conflict in medical evidence between Dr. Welborn, OWCP's second opinion examiner, and Dr. Cabayan, appellant's treating physician, regarding whether appellant continued to have disability or residuals causally related to her accepted right knee conditions, and whether the acceptance of the claim should be expanded to include additional conditions as causally related to the accepted employment injury. As there remains an unresolved conflict of medical evidence, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁶

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 16, 2020.¹⁷

¹⁵ *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁶ *See M.C.*, Docket No. 20-1396 (issued November 22, 2021); *D.P.*, Docket No. 21-0534 (issued December 2, 2021); *L.H.*, Docket No. 17-1859 (issued May 10, 2018); *R.R.*, Docket No. 15-0380 (issued April 10, 2015).

¹⁷ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board