

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

K.W., personal representative of the estate of S.U., Appellant)	
)	
and)	Docket No. 22-0702
)	Issued: February 5, 2024
)	
DEPARTMENT OF VETERANS AFFAIRS, McALESTER VA CLINIC, McAlester, OK, Employer)	
)	

Appearances:
Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On April 7, 2022 appellant, through counsel, filed a timely appeal from a March 21, 2022 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 to consider 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 an 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 March 21, 2022 decision, OWCP received 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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to establish that the employee's employment-related temporary aggravation of right knee patellofemoral disorders had resolved as of October 24, 2019; and (2) whether the employee met her burden of proof to establish continuing disability or residuals on or after October 24, 2019 causally related to the accepted employment injury.

FACTUAL HISTORY

On September 12, 2019 the employee, then a 50-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on that date she struck and injured her right knee on an open cabinet door while in the performance of duty.⁴ She stopped work on September 13, 2019.

In a development letter dated October 7, 2019, OWCP notified the employee of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded the employee 30 days to respond.

In notes dated September 17 and 27 and October 1 and 22, 2019, Dr. M. Stephen Wilson, an orthopedic surgeon, described the employee's September 12, 2019 employment incident and performed a physical examination. He observed weakness in the right knee, positive medial compartment loading test, medial cruciate ligament laxity with stress, tenderness to palpation over the medial and superior medial joint, and patellofemoral crepitation with motion and a small joint effusion. Dr. Wilson diagnosed acute trauma to the right knee, resulting in strain and possible meniscal tear. He attributed the employee's condition to the September 12, 2019 employment incident and recommended a magnetic resonance imaging (MRI) scan. He opined that the employee was totally disabled from work.

By decision dated November 14, 2019, OWCP denied the employee's claim. It found that that the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted employment incident.

On November 25, 2019 the employee requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 18, 2020.

OWCP continued to receive medical evidence. On December 12, 2019 Dr. Brett Kolman, a Board-certified diagnostic radiologist, performed a right knee MRI scan. He noted that the MRI scan demonstrated chondromalacia, an intact medial meniscus, and a postsurgical absence of a large segment of the posterior horn and body of her lateral meniscus. Dr. Kolman determined that the MRI scan demonstrated horizontal intermediate and not fluidlike signal at the anterior horn-body junction which was not convincing for recurrent tear.

On February 26, 2020 Dr. John W. Ellis, Board-certified in occupational medicine, examined the employee and diagnosed right knee chondromalacia patella, which he attributed to

⁴ OWCP assigned the present claim OWCP File No. xxxxxx259. The employee has a prior claim under OWCP File No. xxxxxx910, accepted for right knee sprain, tear of the right knee lateral meniscus, left shoulder contusion, cervical sprain, and left elbow contusion due to a June 14, 2018 trip and fall. The employee also has a claim under OWCP File No. xxxxx146, accepted for contusion of the left elbow and contusion of the left shoulder. The employee's claims under OWCP File Nos. xxxxxx259, xxxxxx910, and xxxxx146 have been administratively combined, with the latter serving as the master file.

work-related injuries. He recommended right knee arthroscopy. Dr. Ellis opined that she was totally disabled from work.

In notes dated February 26, March 25, April 22, and May 19, 2020, Dr. Ellis reviewed the employee's medical history. He reported that she sustained an accepted right knee injury in 2018, that the August 2, 2018 MRI scan demonstrated a tear of the lateral meniscus, and that on September 28, 2018 she underwent right knee arthroscopy with partial lateral meniscectomy and arthroscopic chondroplasty. Dr. Ellis reported that the employee did well after her surgery. He performed a physical examination and related that she exhibited decreased range of motion in the right knee, tenderness to palpation over the medial and lateral joint lines, and positive McMurray's test. Dr. Ellis diagnosed right knee traumatic arthritis and other tear of the lateral meniscus right knee. He opined that the impact of the employee's right knee against the cabinet door caused the direct impact of the patella into the trochlea causing the traumatic arthritis. Dr. Ellis determined that her prior right knee injuries did not contribute to her current conditions as she was not having any problems with twisting, turning, or going up and down stairs. He further noted that when the employee hit the cabinet door, it caused abnormal biomechanical forces through her knee, causing a shearing of the lateral meniscus. Dr. Ellis related that once a meniscus was torn, it was easier to re-tear as the edges were not congruent. He opined that although this meniscal tear was not evident on the MRI scan, there was a significant margin of error on MRI scans, and that a physical examination was more accurate than an MRI to establish that the employee had a recurrent meniscus tear. Dr. Ellis concluded that, due to work-related injuries, she needed an additional right knee arthroscopy.

By decision dated June 2, 2020, OWCP's hearing representative vacated the November 14, 2019 decision and remanded the case for further development of the medical evidence.

OWCP received a report dated June 16, 2020 in which Dr. Ellis repeated his previous findings and conclusions.

On June 23, 2020 OWCP referred the employee, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Christopher S. Jordan, a Board-certified orthopedic surgeon.

On July 13 and August 10, 2020 Dr. Ellis continued to opine that the employee had sustained an additional right meniscal tear and right knee traumatic arthritis due to the accepted September 12, 2019 employment injury.

In a report dated August 24, 2020, Dr. Jordan recounted the employee's symptoms of right knee pain, instability, and catching. He recounted her September 12, 2019 employment incident and reviewed her medical records. Dr. Jordan noted that OWCP had accepted a lateral meniscal tear of the right knee in the employee's prior claim, and that he was currently determining if there was a new additional injury to the right knee. He noted that the December 12, 2019 MRI scan did not demonstrate a recurrent lateral meniscal tear, and that her current physical examination was more consistent with meniscal injury and lateral knee arthritis, rather than a new injury. Dr. Jordan concluded that the employee demonstrated right knee pathology, and recommended a new arthroscopy, but opined that her condition was due to her previously-accepted knee injury. He completed a work capacity evaluation (Form OWCP-5c) finding that the employee could not perform her job duties without restrictions. Dr. Jordan found that she could not twist, squat, kneel, or climb and attributed these limitations to her previously accepted right knee injury.

On October 16, 2020 OWCP requested a supplemental report from Dr. Jordan addressing the employee's current right knee condition and her ability to work.

In a December 7, 2020 supplemental report, Dr. Jordan diagnosed lateral meniscus tear, right knee, lateral knee arthritis right knee, and chondromalacia of the patella. He explained that the mechanism of injury was a direct blow to the anterior knee, which could only damage the part of the knee between the patella and the femur. Dr. Jordan opined that this injury aggravated preexisting chondromalacia of the patella and that the aggravation would usually be temporary, resolving within a month or six weeks following the injury. He determined that this mechanism of injury would not damage the right lateral meniscus and would not cause lateral knee arthritis. Dr. Jordan concluded that the temporary aggravation of the patellofemoral joint had resolved. He opined that the employee did not develop any new pathology in her right knee as a result of the September 12, 2019 employment injury and asserted that the lateral meniscal tear and right knee chondromalacia were present prior to September 12, 2019. Dr. Jordan found that she could work eight hours a day with permanent restrictions on twisting, kneeling, squatting, and climbing due to her previously accepted right knee injuries. He opined that the employee continued to require a new arthroscopy due to her previously-accepted right knee injury claim. Dr. Jordan noted that he did not have an opportunity to review the August 2, 2018 right knee MRI scan or the September 28, 2018 operative report.

By decision dated December 30, 2020, OWCP accepted the claim for temporary aggravation of right knee patellofemoral disorders, resolved as of October 24, 2019.

In January 7 and March 4, 2021 notes, Dr. Ellis expressed his disagreement with Dr. Jordan. He reiterated that, although the employee had a previously-accepted right knee injury, following her recovery she was able to perform her job duties on a daily basis. Dr. Ellis further noted that subsequent to the September 12, 2019 injury, she was unable to work due to severe right knee pain. He agreed with Dr. Jordan that the employee required additional right knee surgery due to her accepted employment injuries. Dr. Ellis maintained his opinion that she was totally disabled from work.

Dr. Yohest Mittal, a Board-certified orthopedic surgeon, completed a note on May 5, 2021 and described the employee's right knee meniscectomy in 2018 and her reinjury in 2019. He recounted her symptoms of continued right knee pain, instability, giving way, and discomfort and possible recurrent meniscal tear. Dr. Mittal performed a physical examination and diagnosed right knee lateral meniscus tear and chondromalacia patella. He noted that the employee's recent MRI scan suggested a possible recurrent lateral meniscus tear and chondromalacia patella. Dr. Mittal recommended surgery.

Dr. Ellis provided a series of form reports dated June 15 through October 26, 2021, finding that the employee was totally disabled from work.

On December 22, 2021 the employee, through counsel, requested reconsideration. Counsel asserted that OWCP incorrectly found that the employee's work-related disability due to the September 12, 2019 and June 14, 2018 employment right knee injuries had resolved, and that she was entitled to wage-loss compensation and medical treatment due to these injuries.

On January 11, 2022 appellant notified OWCP that the employee had passed away on December 30, 2021.

By decision dated March 21, 2022, OWCP denied modification.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of an employee's compensation benefits.⁵ It may not terminate compensation without establishing that the disability ceased, or that it was no longer related to the employment injury.⁶ 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.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.⁹

Where OWCP has accepted a resolved aggravation of a preexisting condition, the date by which the condition resolved must be established by probative medical evidence.¹⁰

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 specialist) who shall make an examination.¹¹ 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.¹² 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.¹³

⁵ *C.P.*, Docket No. 21-1120 (issued January 27, 2023); *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

⁶ *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *S.P.*, *supra* note 6; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁹ *D.G.*, *supra* note 7; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁰ *J.C.*, Docket No. 13-1200 (issued November 1, 2013); *F.M.*, Docket No. 12-590 (issued September 24, 2012); *J.D.*, Docket No. 11-131 (issued December 21, 2011); *Daniel A. Davis*, 39 ECAB 151 (1987).

¹¹ 5 U.S.C. § 8123(a); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹² 20 C.F.R. § 10.321.

¹³ *J.C.*, Docket No. 21-1401 (issued July 20, 2023); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to establish that the employee's employment-related temporary aggravations of right knee patellofemoral disorders had resolved as of October 24, 2019.

Dr. Ellis provided reports dated February 26, 2020 through March 4 2021 supporting causal relationship between the employee's right knee traumatic arthritis and an additional tear of the lateral meniscus of the right knee and the September 12, 2019 employment injury. He opined that the impact of the employee's right knee against the cabinet door impacted the patella into the trochlea causing the traumatic arthritis. Dr. Ellis also opined that when the employee's right knee hit the cabinet door, it caused abnormal biomechanical forces through her knee, causing a shearing of the lateral meniscus. He related that once a meniscus had been torn, it was easier to retear as the edges were not congruent. Dr. Ellis concluded that due to work-related injuries she needed an additional right knee arthroscopy and was totally disabled from work.

In reports dated August 24 and December 7, 2020, Dr. Jordan, OWCP's second opinion physician, opined that the employee sustained only a temporary aggravation of her preexisting patellofemoral disorders of right knee which resolved as of October 24, 2019. He opined that the September 12, 2019 injury was a direct blow to the anterior knee, which could only damage the part of the knee between the patella and the femur and temporarily aggravated preexisting chondromalacia of the patella. Dr. Jordan determined that the September 12, 2019 injury would not damage the right lateral meniscus and would not cause lateral knee arthritis.

The Board finds that an unresolved conflict in the medical evidence exists between Dr. Ellis, the employee's treating physician and Dr. Jordan, OWCP's referral physician, with respect to whether appellant's employment-related temporary aggravations of right knee patellofemoral disorders had resolved as of October 24, 2019.¹⁴ As previously stated, when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an IME to resolve the conflict in the medical evidence.¹⁵ Consequently, the Board finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to establish that the employee's employment-related temporary aggravations of right knee patellofemoral disorders had resolved as of October 24, 2019.¹⁶

¹⁴ See *T.D.*, Docket No. 21-1292 (issued April 19, 2022); *B.T.*, Docket No. 20-1665 (issued July 2, 2021); *D.B.*, Docket No. 20-1142 (issued December 31, 2020); *R.P.*, Docket No. 15-1893 (issued February 24, 2016).

¹⁵ 5 U.S.C. § 8123(a); *S.C.*, Docket No. 20-0856 (issued August 26, 2021); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *S.T.*, Docket No. 16-1911 (issued September 7, 2017); *G.B., widow of R.B.*, Docket No. 16-1363 (issued March 2, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁶ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 5, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board