

U.S. Department of Labor
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of _____ claimant; employed by _____ Case No.: _____
Hearing was held on _____ in Atlanta, Georgia.

The issues are (1) whether the claimant's recurrence of total disability on about _____ due to a left total knee arthroplasty (TKA), was causally related to her employment injury of _____ and (2) whether the claimant recovered from her medical condition causally related to the _____ injury by _____ when authorization for medical benefits was terminated.

On _____ the claimant, then a _____ year old food inspector,¹ filed a Form CA-1, Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay and Compensation, asserting that same day she tripped over a pallet and twisted her left knee. She stopped work on _____ and received initial medical attention that day.

In a _____ report, Stacey Bean, a physician assistant, indicated that the claimant was seen in "recheck" of her workers' compensation injury at the _____. The diagnosis was status post left patella dislocation with left knee sprain, rule out lateral meniscus

¹ The file contains a position description for the job of inspector, indicating that the job required moderate carrying of up to 44 pounds, repetitive motion of the upper body and limbs, reaching above the shoulder, use of fingers with exterior normal sensation required, use of both hands, walking 8 hours a day, standing 8 hours a day and limited to 4 foot space, climbing of stairs and vertical ladders, use of both legs, correctable vision and correctable hearing along with ability to detect orders and to engage in clear speech. It noted that environmental factors included slippery and uneven walking surfaces.

tear. Ms. further indicated that the claimant would be referred to Dr.

In a report Dr. a board certified orthopedist, indicated that the claimant fell on and dislocated her patella. He said that this had happened before, including one time at work when she slipped on ice. He further said that historically she had undergone three previous surgical procedures on her knee including a formal realignment in but unfortunately, the patella had dislocated even after that. Dr. Bainbridge diagnosed recurrent dislocation and recommended diagnostic arthroscopy, debridement, open realignment and lateral retinacular release.

By letter dated the Office of Workers' Compensation Programs advised the claimant that her claim had been accepted for a condition of dislocated patella of the left knee. By letter dated the Office authorized Dr. Bainbridge to perform a left knee arthroscopic surgical repair.

On the claimant filed a Form CA-7 claim for compensation, which indicated that she received continuation of pay for disability from to and was claiming compensation for temporary total disability (TTD) for the period beginning The Office paid TTD compensation for the period beginning

In a 9 History and Physical Examination Report Dr. Bainbridge indicated that the claimant fell on and dislocated her patella. This had happened before, including one time at work where she slipped on ice. She had a formal realignment in . Because of continued patella dislocations, she was being admitted for diagnostic arthroscopy and realignment of her patella as well as lateral retinacular release.

In a report Dr. indicated that day he performed surgery on the claimant consisting of diagnostic arthroscopy. Immediately he saw that she had 90% of her medial meniscus removed. She had an unstable meniscus of which he excised a portion. She had grade IV lesions on the tibia which he shaved off. She had grade III chondromalacia on the femoral surface which he shaved off. She had a flap of synovial tissue of the meniscus which he shaved off. She had some changes on the medial facet consistent with dislocation which he shaved off. He then performed a lateral retinacular release. The post operative diagnosis was mal-alignment left patella with

recurrent dislocation, grade III and IV chondromalacia medial femoral condyle, tibial plateau, and subluxation left patella.

In an _____ report Dr. _____ indicated that he had released the claimant to return to work as of _____.

In a _____ report Dr. _____ indicated that since the claimant had a lateral release she would probably have swelling in the superior lateral aspect of her knee probably for the rest of her life.

In a _____ report Dr. _____ indicated that the claimant had more swelling than she was comfortable with and had pain in the knee with pain going up to the groin and into the foot and she needed to be evaluated by a physician for an infection or blood clot.

In a _____ report Dr. _____ indicated that the claimant was still having discomfort and swelling of the knee and did have known degenerative arthritis of the medial compartment of the left knee.

In a _____ report Dr. _____ indicated that the claimant had some swelling of the left knee and some snaps, clicks and pops.

In a _____ report Dr. _____ indicated that the claimant had surgical procedures of her knee done in high school about 18 to 20 years previously, and another procedure in the 1980's, and then the most recent surgery, but she continued with a lot of discomfort in the knee. He further indicated that an MRI (magnetic resonance imaging) of _____ showed significant articular cartilage loss on the medial femoral condyle and a lot of thinning and changes in the patella, and that further surgery was recommended.

In a _____ report Dr. _____ a radiologist, indicated that an MRI of the claimant's left knee showed degenerative disease due to loss of the articulating cartilage and hypertrophic spur formation.

In an _____ report Dr. _____ recommended further surgery, stating,

It is my opinion that this is related to her original injury and that she has had progressive changes with significant loss of the articular cartilage associated

with the injury and proven by MRI and conservative management has not worked thus far, hence I recommend repeat arthroscopy and consideration of Mosaic-plasty.

In a report Dr. : indicated that day he performed surgery on the claimant's left knee during which he saw grade III and IV chondromalacia of the medial femoral condyle which was too big for a Mosaic-plasty. There was no evidence of a medial meniscus. He did a chondroplasty both on the tibial side and the femoral side. On the tibial side there were grades I through IV chondromalacia which he trimmed off. The anterior and posterior cruciate ligaments were intact. In the lateral compartment the meniscus and articular looked very good. A lateral retinacular release was done on the left. The medial retinaculum was released and the infrapatellar tendon was freed up and an old screw was removed and replaced. The postoperative diagnosis was mal-alignment left patella and grade III and IV chondromalacia medial femoral condyle. The procedure was stated to be "diagnostic arthroscopy, chondroplasty medial femoral condyle and tibial plateau and a patellar realignment through an open procedure and release of the lateral retinaculum and raphing up of the medial retinaculum."

In an report Dr. : indicated that the claimant was doing well status post surgery and her staples were removed. He noted she continued off work as no light duty work was available but if light duty work was available she could return to deskwork.

In a report Dr. indicated that the claimant was disabled for another six weeks.

In a report Dr. an associate of Dr. indicated that there was a mild prominence of the screw in the claimant's left knee but no evidence that it had backed out, and the screw could be removed once the surgery had healed.

In a report Dr. indicated the claimant continued with a prominent screw and would remain off work.

In a report Dr. indicated the claimant underwent a FCE (functional capacity evaluation) and really did well and she could return to work where she did not have to kneel, squat, or crawl, and she was limited in lifting.

In a report Dr. indicated that in the claimant underwent left knee surgery and was doing well status post that surgery with a little swelling and soreness. The diagnosis was post op mal-alignment of the patella with moderate degenerative changes of the medial femoral condyle and patella. She was allowed to return to work as of and would start at 2 hours per day for the first week and advance 1 hour per day each week until she returned back to full normal duty.

On the employing agency made a written offer of limited duty to the claimant indicating that beginning she would work 2 hours per day and each week after that she would increase her hours of work by 1 hour per day until she returned to 8 hours per day work by .

On the claimant accepted the light duty job offer.

The claimant returned to 2 hours per day limited duty work on about The Office terminated TTD compensation and paid compensation for 6 hours per day wage loss.

In a note Dr. recommended that the claimant work 4 hours per day for 2 more weeks and after that increase it 1 hour per day each week.

By letter dated the employing agency indicated that due to Dr. report the claimant's work schedule had been revised such that she was not expected to return to 8 hours per day work until On the claimant accepted this revised job offer.

In a report Dr. indicated the claimant was working 4 hours a day but by the end of 4 hours she had a pretty swollen knee and some numbness and tingling of the foot. Her physical therapist thought it would be appropriate to keep her at 4 hours per day work and Dr. did not disagree. Her diagnosis was status post op realignment of patella with severe chondromalacia of the patella and she would be maintained at 4 hours per day work.

In an report Dr. indicated that the claimant had grade III and IV chondromalacia of the medial femoral condyle which was far too big for a Mosaic-plasty and an unloading brace was ordered for her.

In an _____ report Dr. _____ indicated that the claimant had an episode walking down the stairs recently where it felt like her patella slipped. However, on examination he did not find a patellar dislocation, although he did find some crepitus under the patella.

By about _____ the claimant had worked up to 8 hours of work per day, and the Office paid compensation for partial work hours to _____

In a _____ report Dr. _____ indicated the claimant was extremely tender in her left calf and she would be sent for an ultrasound to rule out deep venous thrombophlebitis.

In a _____ report Dr. _____ a radiologist, indicated the claimant underwent a normal venous Doppler study of the left lower extremity.

On _____ the claimant filed a Form CA-7 claiming compensation for TTD beginning _____. The Office did not pay this claimed compensation.

In a _____ report Dr. _____ indicated that the claimant had been trying to work 8 hours and had a lot of swelling of the left leg and also the right leg. Because of this she had a couple of ultrasounds which were negative for thrombophlebitis. Her diagnosis was severe degenerative arthritis of the left knee and chronic venous insufficiency of both legs. She needed further surgery on the left leg and needed to see Dr. _____ for evaluation of her venous insufficiency. The claimant was in a job where she had to stand all day long and this was contraindicated with her venous insufficiency as well as her degenerative joint of the left knee.

In a _____) report Dr. _____ a board certified surgeon, indicated that the claimant had undergone a Doppler ultrasound that was totally normal and there while there was probably some degree of venous insufficiency it was not related to any type of thrombosis. He said she needed to be off her leg as much as possible and elevate it to decrease the swelling, and there was no reason why she could not undergo left knee surgery.

On _____ the claimant filed a Form CA-2a, Notice of Recurrence of Disability and claim for compensation, asserting that on _____ she had to stop work due to a recurrence of

her employment injury. She stated that she had never been released from Dr. care after the injury and her injury worsened over time. She noted that she underwent surgeries to her left knee in and September 1999 and she underwent ultrasound on and along with extensive physical therapy.

In a report Dr. indicated that day he performed a left total knee arthroplasty. He stated the post operative diagnose was degenerative joint disease of the left knee.

By letters dated the claimant was referred for a referee medical examination by Dr. to resolve a conflict in medical opinion between Dr. ^{1,2} the Office's district medical director (DMA) and Dr. However, a letter on file dated July 10, 2000 has the word "cancelled" written over it.

In a report Dr. indicated that the claimant was doing well status post total knee arthroplasty.

In an report Dr. indicated that the claimant had reasonable results from her status post op total knee arthroplasty but thrombophlebitis had to be ruled out and she would be sent for another ultrasound.

By letters dated the claimant was referred to Dr. to resolve the conflict in medical opinion between Dr. and Dr.

In a report Dr. indicated the claimant was doing well status post total knee arthroplasty and should continue off work.

In an report Dr. indicated that due to the claimant's severe degenerative joint disease of the knee with total knee arthroplasty she should not work in a very

² The file contains memorandums indicating that Dr. provided an opinion that the claimant's recurrence of total disability beginning was not causally related to the work injury, but subsequently part of the case file, including this opinion, was lost. part of the compensation case file was lost. However, Dr. later provided an opinion dated , quoted later in this decision.

slippery environment on her feet for 8 hours a day and she should have job retraining.

In an _____ report a physical therapist indicated that the claimant could perform sedentary work only with very minimal walking and standing due to her status post left total knee arthroplasty.

In an _____ report Dr. _____ indicated that the claimant had swelling not only of the left leg but also of the right leg and he was going to stop her Vioxx because that might be causing the swelling.

By letters dated _____ the Office referred the claimant for a referee medical examination by Dr. _____

On _____ the claimant authorized Paul Felser, Attorney at Law, to represent her in her compensation claim.

In a _____) report Dr. _____ indicated that the claimant had degenerative joint disease of the left knee and was not a good candidate for any job that required standing.

In a _____ report Dr. Agarwal, a board certified orthopedist, indicated that he had reviewed medical records and had interviewed and examined the claimant. He reported the results of his examination. He stated that the claimant "suffers from pre-existing degenerative joint disease which possibly was mildly aggravated secondary to multiple injuries of the left knee with the latest being that of 2/18/99 causing subluxation/dislocation of the patella resulting in total knee arthroplasty..."

Dr. _____ completed a Form OWCP-5, indicating that the claimant could work 4 to 6 hours a day and no standing or walking more than 4 to 6 hours a day. Pulling, pushing and lifting was limited to 40 pounds.

In a _____ report Dr. _____ indicated that the claimant had an unstable total left knee replacement and a reverse Mauck procedure would be done.

In a _____ report Dr. _____ indicated that he had performed surgery on the claimant consisting of a "reverse

³ The report was actually dated _____ but context indicates this was a typographical error and it should have been dated _____

Mauck" for a condition of "medial collateral instability left knee following total knee arthroplasty."

In a statement the Office of Personnel Management (OPM) indicated that the claimant's application for disability retirement had been approved.

In a letter the employing agency advised the Office that the claimant's disability retirement had been approved effective and the claimant had also been approved for Social Security Benefits effective

In a report Dr. indicated the claimant was six weeks post reconstruction of the medial collateral ligament and the wound looked good.

By letter dated the Office asked Dr. the following question:

In your opinion, was the total knee replacement caused or precipitated by the employee's work incident of Please provide explanation for your answer.

In a report Dr. wrote as follows:

In my opinion the total knee was not caused or precipitated by the employee's work accident of The explanation is as follows:

1. She had severe pre-existing degenerative joint disease of the left knee.
2. She had another surgery for dislocated patella on 3/17/99 and 9/99 - same problem she had at age 16.
3. It takes long time (10-15 years) to develop degenerative arthritis. She got total knee replacement only after 15 months since her injury on 2/18/99, obviously she had a pre-existing joint disease.
4. Subluxation of patella in female body is very common. She had a knee surgery at age 16. Also she had a total of 3 operations on her knee before she joined the USDA.
5. Pre-existing conditions caused or precipitated her degenerative arthritis knee. Previous x-ray

(prior to 2/18/99) shows degenerative arthritis left knee.

In a report Dr. indicated that the claimant had a failed left total knee replacement and she would undergo further left knee surgery.

In a report Dr. indicated that day he performed revision of the claimant's failed left total knee replacement.

An Office claims examiner prepared a statement of accepted facts (SOAF) dated , which indicated that prior to her USDA employment the claimant had significant pre-existing left knee injuries and had undergone 3 left knee surgeries, including arthroscopy with cartilage removal, patella re-alignment and insertion of screw in the proximal tibia. It noted that the claimant had a workers' compensation claim for date of injury when she fell down some slippery stairs and twisted her left knee and she had another workers' compensation claim for date of injury of when she slipped on ice and twisted her left knee. It further noted that the present claim concerned a injury when she tripped over a pallet and twisted her left knee, and her claim for such injury was accepted for dislocated patella of the left knee with surgery performed on . It further noted that on the claimant underwent a left total knee arthroplasty and that the claimant had not worked since

The Office referred the case record and SOAF to Dr. and in an report Dr. wrote as follows:

In response to the question posed in the "Case File Review Request," I did not keep a copy of my opinion that was generated at the time of the previous file review I may have made. I also don't see in the file a copy of any questions that may have been posed to me.

On the other hand, in complete re-review of this file, I note that on the claimant sustained a twisting knee injury.

The earliest note about her condition that is in this file is dated . At that time the left knee was reported as showing no deformity or swelling. She had

full range of motion but was reported to have pain over the lateral meniscus into the tibial tubercle.

My medical opinion in re-review of this file without the benefit of all the file documentation, the previous questions submitted for my comments, and perhaps many records that have not been placed in this reconstructed file is that the claimant sustained on a strain of the left knee with a patellar dislocation.

From the records she did not sustain any indication in the note, in any event, of any findings suggestive of an injury to the internal structures of the left knee.

I would say medically that the left knee injury of did not cause, aggravate, accelerate or precipitate the left knee pathology for which the claimant had a left total knee replacement.

In reading Dr. report dated he indicated in a comment characterized as Etiology on page 6 "Ms. suffers from a pre-existing degenerative joint disease which possibly was mildly aggravated secondary to multiple injuries of the left knee with the latest being that of ..."

If this claimant had "aggravation," in this program the case would have to be accepted then for the aggravation of the degenerative joint disease even though Dr. offered an addendum report of in which he indicated "the total knee was not caused or precipitated by the employee's work incident of"

It can't be both ways.

If there was even a modicum of aggravation, OWCP would have to accept it.

If OWCP accepted aggravation, the total knee replacement, inappropriate medically as it may be, may also have to be accepted.

It will be necessary to further consider aggravation.

The definition of aggravation used by OWCP must be provided to Dr. . He must, bearing in mind that definition, provide a total rationalized medical opinion as to whether the event permanently aggravated the pathophysiology in the left knee joint or caused a pain complaint only. Pain would not necessarily of and by itself be a basis to adjudicate that the internal pathology of the left knee was aggravated.

By letter dated . the Office asked Dr. the following questions:

1. Please discuss your findings in the etiology section of your report. Is it your medical opinion that the work incident aggravated Ms. pre-existing degenerative joint disease in the left knee? The Federal Employee's Compensation Act defines aggravation as occurring if "a pre-existing condition is worsened, either temporarily or permanently, by an injury arising in the course of employment. For instance, a traumatic back injury may aggravate a claimant's pre-existing degenerative disc disease and compensation would be payable for the duration of the aggravation as medically determined. See FECA 2-805-2b.
2. If you find that the underlying condition was aggravated by the work incident, was the aggravation temporary or permanent? Temporary and permanent aggravations are defined by the FECA as follows:
 - a. Temporary aggravation involves a limited period of medical treatment and/or disability, after which the employee returns to his or her previous physical status. Compensation is payable only for the period of aggravation established by the weight of medical evidence and not for any disability caused by the underlying condition. This is true even if the claimant cannot return to the job at the time of the injury because the pre-existing condition will worsen if he or she does so. See FECA 2-805-2b(1).

b. Permanent aggravation occurs when a condition will persist and definitely due to the affects of the work related injury or when a condition has been totally worsened such that it will not revert to its previous level of severity. For instance, an allergy which would have persisted in any event may be permanently aggravated by exposure to dust in the workplace such that the subsequent episodes are more severe than they otherwise would have been. See FECA 2-805-2b(2).

3. The FECA requires that your finding of an aggravation be based upon an underlying change in the pathology of the left knee and not merely on subjective complaints of pain. Pain alone is not sufficient to establish that an aggravation of an underlying condition has occurred.

In an _____ report Dr. _____ stated in pertinent part:

Ms. _____ work incident on _____ aggravated her pre-existing condition but the aggravation due to her work incident is temporary. As I mentioned on my letter of _____ the degenerative arthritis takes a long time to develop.

My objective finding of an aggravation is based upon an underlying change in the pathology of the left knee as I reviewed her x-ray and examined her. I am convinced that she does not have a permanent aggravation of the left knee because of work incident.

By letter dated _____ the Office asked Dr. _____ the following:

One crucial issue remains unresolved. We cannot resolve this claim without obtaining an answer to the following question:

1. You state in your _____ report that the _____ work incident temporarily aggravated Ms. _____ pre-existing left knee

condition. Had this aggravation ceased prior to the left total knee replacement?

In a report Dr. : indicated that the claimant continued with degenerative joint disease of the left knee status post op total knee with revision. He noted that he needed a copy of Dr. : reports.

In a report Dr. wrote as follows:

I reviewed all her file again in regards to your questions: "Had this aggravation ceased prior to the left total knee replacement? I examined this patient and based on my objective findings, the answer to your question is "yes".

The file contains a memorandum to the file dated indicating that since Dr. original report had been lost, Dr. reports could not be considered the reports of a referee medical specialist resolving a conflict in medical opinion and therefore Dr. medical reports would be treated as the reports of a second opinion physician.

On the Office issued a Notice of Proposed Termination of Compensation and Medical Benefits on the grounds that the second opinion reports of Dr. established that the claimant's injury of caused only a temporary aggravation of a pre-existing left knee condition, which ceased prior to the left TKA of accordingly she was not entitled TTD compensation beginning June 1, 2000 or continuing medical treatment.

In a report Dr. indicated that the claimant fell on her leg about a week ago but x-rays showed no loosening of the prosthesis or motion.

On the Office issued a final notice of termination of compensation (medical benefits), indicating that the information received subsequent to was insufficient to support that her claim of ongoing effects of the work injury, and the weight of medical evidence or record continued to rest with the reports of Dr.

By letter dated Mr. Felser requested a hearing in the Atlanta area.

A hearing was held on _____, at which the claimant was represented by Mr. Felser and testified that prior to _____ she had a left knee condition consisting of two surgeries when she was in her teens and a _____ injury at a hog farm with a third left knee surgery performed in _____; that after the surgery of _____ she did well and had no significant problems of her left knee until _____; that she did vaguely recall two work-related injuries to her left knee occurring in _____ but they were not severe and healed without any problem; that at work on _____ she tripped over a pallet and fell, injuring her left knee; that she then saw a physician assistant and then Dr. _____ that she did not work from about _____ to about _____; that from _____ to about _____ she worked, first 2 hours a day, and then 3 hours a day, then 4, 5, 6, 7 and finally 8 hours a day, duty standing and doing the work of an inspector; that each day she worked her knee swelled to about twice its size; that on _____ her knee swelled to about twice its size and she had more pain than before, so she stopped work and had not returned to any work since then; that she had applied for and received social security and OPM benefits; that after _____ she sustained no new accidents to her left knee, although she did believe that her left knee collapsed at work sometime around _____. I told the claimant that if she wanted to claim that standing day to day at work caused any knee condition, she would have to file a CA-2, and this hearing was only about the effects of the _____ work injury. Mr. Felser argued at the hearing to the effect that Dr. _____ report was of diminished probative value because it was not clearly based on a complete medical background, as he did not have any reports prior to _____, and also because the file had been lost, and also because he gave insufficient medical rationale to support his opinion that the effects of the _____ ceased prior to the TKA of July _____. He further argued that the reports of Dr. _____ and Dr. _____ (exhibit one of the hearing) were sufficient to prove that the claimant's continuing medical problems and disability of the left knee were causally related to the _____ work injury, or at the very least, they constituted a conflict with the reports of Dr. _____.

Exhibit one of the hearing is an _____ report of Dr. _____, a board certified orthopedist and associate of Dr. _____. Dr. _____ noted that in 1980 the claimant had an arthroscopy of her left knee for a torn cartilage and in 1981 she had an operation for malalignment of her left kneecap. After that she did quite well until she fell and twisted her

left while working on a hog farm in She underwent arthroscopic surgery for a torn cartilage in After that she did well and had no swelling or pain of the left knee until when she tripped on a pallet at work and sustained a patellar dislocation of the left knee. He noted that x-rays of showed some narrowing in the medial compartment of the left knee and a screw present from a previous operation, but overall the patella looked good. He further noted that she had a very lax patella believed to be due to recurrent dislocations. He further noted that on she underwent surgery, at which time a recurrent left patella dislocation was found along with chondromalacia of the medial femoral condyle and tibial plateau. He further noted that after this surgery the claimant improved but continued to complain of pain and swelling, and because of this another surgery was performed consisting of chondroplasty, patellar realignment and release. After this surgery she returned to work but complained of left knee pain and welling. He said that x-rays of revealed almost total collapse of the medial compartment. He noted that she underwent left TKA on He report post TKA she initially did well for about three months, but then began to have some instability of her left knee. He said that because of instability the claimant underwent another surgery to tighten up the medial collateral ligament of the left knee. After that she developed more pain and instability and a second TKA was performed on He said that currently, about one year post second TKA, the claimant complained of pain and limited ability to walk or stand or due other activities with her left leg. He noted she was 5 feet 9 inches tall and reported 250 pounds weight. He further reported his examination of her. He diagnosed status post TKA. He stated,

Causation within a reasonable degree of medical certainty was her injury of Ms. did have problems with her knee and had had three operations between but there was a nine year period of time between when Ms. did quite well... Ms. Sheckler by history tripped over a pallet while at work. Her work does require long standing, walking and she does work in a very slippery environment as a federal meat inspector at meat packing plats... I believe that the prolonged standing, working in a slippery environment and hazardous environment has produced the present condition...

Dr. further opined the claimant had a 75% PPI of the LLE and could perform work not requiring prolonged standing, walking, kneeling, squatting, climbing, running jumping or lifting over 15 pounds.

Exhibit two of the hearing is an undated report of Dr. stating, "I concur with the finding of Dr. impairment rating."

Exhibit three of the hearing is an affidavit of indicating she was the aunt of the claimant and was present when Dr. examined the claimant and "I can testify that during the exam Dr. was asked if he was still practicing full time and he stated that he was not and that he had not been since he had a heart attack. He also stated that he was performing second opinion-referee examinations." (Mr. Felser argued at the hearing that this lessened the probative value of Dr. reports.)

I gave the claimant 30 days to submit the complete records of examination and treatment of the left knee prior to and the complete records of Dr. However, to date, no further medical records have been received.

I find that there is a conflict in medical evidence that must be refereed under section 8123 of the Federal Employees' Compensation Act.

Section 8123 of the Act provides that a conflict in medical opinion between a physician making an examination for the Office and a physician making an examination for a claimant shall be refereed by a third physician. For section 8123 to be invoked the opposing medical reports must be of virtually equal weight and rationale.⁴

In the present case, the Office denied the claim of recurrence and terminated authorization for medical benefits based on the second opinion reports of Dr. in which he opined that the claimant had only a temporary aggravation of pre-existing degenerative arthritis of the left knee. He indicated that he based this opinion on "objective findings" of an x-ray and examination, but he did not explain the exact findings on examination and x-ray that convinced him that the claimant had only a temporary aggravation. Moreover, he did not have any of

⁴ Edward L. Ashworth, ECAB Docket No. 95-944, issued March 10, 1997.

the medical records of the pre-existing condition, to provide a proper background upon which to base his opinion.

At the hearing the claimant submitted a report of Dr. [redacted] in which he opined that the claimant's status post TKA left knee was causally related to the [redacted] injury. Dr. [redacted] rationale for this opinion is somewhat unclear, but appears to be that the claimant had few problems of the left knee a number of years before [redacted] which implicated the [redacted] injury as the causative factor. However, the mere absence of a medical problem prior to a work injury does not prove in and of itself that the work injury is the cause of all subsequent problems.⁵ Moreover, Dr. [redacted] muddied the waters by also attributing the claimant's left TKA to prolonged standing and walking in a slippery environment at work. As stated to the claimant at the hearing, if she wants to pursue this claim, she must file a form CA-2.

As indicated in the two preceding paragraphs, both Dr. [redacted] and Dr. [redacted] had some defects in their opinions. Dr. [redacted] opinion cannot clearly be found to have any greater weight or rationale than the opinion of Dr. [redacted]. After considering everything, I find their reports to be of virtually equal weight and rationale. Accordingly, I find there is a conflict in medical opinion between them necessitating a referee medical examination under section 8123 of the Act.

Based on the foregoing, the [redacted] decision of the Office is set aside and the case is returned to the District Office for it to have the claimant submit the medical records of the pre-existing left knee condition. Once these have been received, the Office should refer the claimant, augmented case record and an SOAF for a referee medical examination to resolve

⁵ Thomas D. Petrylak, 39 ECAB 276.

the conflict in medical opinion between Dr. _____ and Dr. _____
After this, the Office should perform any other action
it deems necessary and should issue a de novo decision on the
claim.

DEC 31 2007
DATED: _____
WASHINGTON, D.C.

Hearing Representative
For
Director, Office of Workers'
Compensation Programs