

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUADALUPE L. TORRES and U.S. POSTAL SERVICE,
POST OFFICE, Santa Clarita, CA

*Docket No. 98-2173; Submitted on the Record;
Issued April 24, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement and entitlement to medical benefits effective June 21, 1998 on the grounds that he no longer suffers from disability or residuals from his accepted employment injuries.

The Office accepted that on March 6, 1978 appellant, then a 29-year-old mailhandler, sustained injury to his right knee when his supervisor violently shoved him away from a cart he was pushing.¹ The Office accepted that appellant sustained aggravation of arthritis of the right knee and right knee strain.² Appellant was off work for two or three days, then returned to full duty and worked until May 10, 1978, after which appellant's work became somewhat erratic. Appellant stopped work completely on April 16, 1979 and was terminated from employment with the employing establishment on April 23, 1979 for being absent without leave. Appellant returned to work in private industry from 1980 to 1981. He was placed on the periodic rolls for receipt of compensation on August 27, 1988.³

Appellant began treatment with Dr. Robert R. Lawrence, a Board-certified orthopedic surgeon, in 1987. Dr. Lawrence saw him most recently on July 31, 1990 and on January 10,

¹ Appellant's supervisor was charged with assault.

² Appellant had received a gunshot wound to his right knee in Vietnam in 1968 and had preexisting degenerative osteoarthritis of that joint. He received a 40 percent veterans disability pension due to the gunshot wound. However, none of his subsequently claimed conditions, including severe back and hip pains, painful spasms, sprained or swollen ankles and anxiety attacks were accepted as being related to the March 6, 1978 employment injury.

³ Appellant's original claim was denied on January 25, 1979, but was remanded for further development by hearing representative decision dated June 18, 1985.

1991 and opined that he remained disabled, happy to take his narcotic analgesics and too angry to be retrained in another line of work.⁴

The Office, thereafter, referred appellant to Dr. Marvin Frieder, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated January 10, 1994, Dr. Frieder reviewed appellant's 1968 military gunshot wound history and its sequelae,⁵ noted that the military discharged appellant one and one-quarter years later with a 40 percent disability pension attributable entirely to his right knee injury.⁶ Dr. Frieder noted that appellant continued to do hard work after his military discharge, including construction work and bricklaying, until his injury at the employing establishment. He noted that the post injury, medical reports of June 14 and July 10, 1978 from Dr. Philip F. Macon, a Board-certified orthopedic surgeon, identified old chronic changes in the supracondylar area of the femur with osteophytic changes in the joint line, but without evidence of effusion or crepitation and he returned appellant to unlimited work. Dr. Frieder also noted: (1) that by reports from March, July and August 1979 Dr. Macon found that as of March 12, 1979 appellant was capable of returning to work in his preindustrial injury status; (2) that as of March 14, 1979 appellant's right knee effusion was gone and that he was able to do exercises; (3) that appellant had a 50 percent service-connected disability for which he was being followed by the Veterans Administration; and (4) that appellant had returned to his status prior to the employing establishment injury of 1978 and that he had no greater disability than could be explained by the previous 1968 injury. Dr. Frieder performed a complete physical examination, obtained current x-rays and noted that appellant had no sign of acute right knee inflammation a few months after his 1978 injury, that the record clearly indicated that there was marked structural change at the time of appellant's 1970 discharge from the military and that, upon low back physical examination there were multiple examples of inappropriate and internally contradictory findings, which indicate a lack of cooperation on appellant's part in the subjective elements of the examination. He further noted that upon right knee examination there were inappropriate clinical findings, which again indicated a lack of cooperation in the subjective elements of right knee examination and which

⁴ Dr. Lawrence found that appellant had a marked antalgic limp with severe crepitus, and that previous x-rays showed a completely missing lateral compartment with the femur rubbing directly on the tibia in the lateral compartment. Dr. Lawrence noted that appellant had "had problems with the right knee over the years and has pain and stiffness in the right knee and foreshortening of the right femur secondary to an old gunshot wound." Dr. Lawrence noted appellant's considerable chemical dependency, and that total knee replacement was recommended but refused by appellant who wanted to take medication and be considered 100 percent permanently disabled for all work and not be retrained.

⁵ Naval hospital records from May 2, 1968 reported a gunshot wound to the right femur and knee, malunion of the right femur with 15 degrees of hyperextension of the knee and a shortening of 1.5 inches, chronic lumbosacral strain, moderately severe degenerative arthritis of the right knee, quadriceps atrophy, and moderate fibrous ankylosis of the right knee secondary to trauma. Medical records dated January 22, 1969 from Camp Pendleton report a healing fracture of the femur, irregularity of the patella with chondromalacia, and, by x-ray, irregularity of the superior pole of the patella.

⁶ He noted that medical examination on July 29, 1970, pre-1978 employment injury, revealed that the right leg was one and three-quarter inches shorter than the left, that appellant had a sway back and quite obvious right lumbar scoliosis, and that this explained appellant's chronic lumbosacral strain.

indicated a disproportion between his complaints and his physical findings, with probably exaggeration of his right knee subjective symptoms.⁷ Dr. Frieder opined:

“Certainly [appellant] appears no more disabled, on a reliable objective basis, than the 40 percent awarded to him in 1970 for various factors of disability associated with the gunshot injury to his right knee. There is evidence in the review of the record of long-term problems with motivation in this patient, which provide a more likely explanation of failure to return to work than physical or organic disease. The accident he describes in 1978 is rather a trivial one and much less likely to produce continuing disability in the preexisting condition of his knee. Certainly his alleged back and hip pain cannot be ascribed to the circumstances of the injury on March 1978.”

Dr. Frieder opined that there were no subjective and no objective factors of disability at that point, which were apportionable to his industrial injury of March 1978 and he noted:

“[Appellant] has a malunion in the right femur with marked osteoarthritic changes in the lateral and patellofemoral joint compartments and narrowing of the lateral joint space as well as scarring about the right knee and some limitation of flexion, which because of lack of cooperation, it is difficult to quantitate, which are entirely apportionable to the natural progression of the preexisting consequences of the gunshot wound on a nonindustrial basis, he had prior to the injury of March 1978. [Appellant] has the same capability of work, on an objective and physiologic basis, he had prior to the injury of March 1978. Absent the alleged industrial injury of March 1978, he would have the same factors of disability. [Appellant] requires no further active treatment for the consequences of his alleged industrial injury on March 1978.”

However, by form report dated May 12, 1994, Dr. Lawrence completed a work restriction evaluation noting that appellant was completely and permanently disabled.

By narrative report that date, Dr. Lawrence noted that Dr. Frieder “blames all of the patient’s problems essentially on his preexisting problem from the war in Vietnam,” and he opined, in contrast, that he felt appellant needed “a total knee replacement, relating to the work injury of March 6, 1978.”⁸ Dr. Lawrence later reiterated that he felt appellant “needs a right total knee replacement under workers’ compensation.”

The Office then determined that a conflict in medical opinion evidence existed between Dr. Frieder, the second opinion specialist and appellant’s treating physician, Dr. Lawrence, and it referred appellant, together with a statement of accepted facts, questions to be answered and

⁷ Dr. Frieder also commented that there was some indication in the record that appellant’s relationship with military authority and/or work supervisors may have been impaired by motivational problems, and that his recollection of events at the time of his discharge and/or at the time of the termination of his employment may not be entirely accurate.

⁸ However, no explanation for this belief was provided.

the complete case record, to Dr. Nitin A. Shah, a Board-certified orthopedic surgeon, for an impartial medical opinion to resolve the existing conflict.⁹

By report dated September 23, 1994, Dr. Shah reviewed appellant's history of injury and Dr. Lawrence's report, noted that appellant felt that Dr. Frieder was abusive in his remarks and did not report the correct findings, but noted that he had not been given Dr. Frieder's actual report to review.¹⁰ Dr. Shah noted appellant's present complaints, performed an orthopedic examination and diagnosed "[p]ost-traumatic osteoarthritis, right knee, status post gunshot wound, right lower extremity and industrial injury to the right knee of March 6, 1978, [l]ong-term use of analgesics, muscle relaxants and possible chemical dependency [and] chronic depression." He opined that appellant could not perform his usual position of mailhandler but noted that appellant could perform some modified-type work. However, Dr. Shah did not address the causal relation of appellant's present condition to the March 6, 1978 injury.

A supplemental report was requested from Dr. Shah to clarify his opinion and by report dated June 20, 1995, Dr. Shah noted that he again examined appellant and the records and provided his findings, which were the same as those noted in his 1994 report.¹¹ He opined that appellant had not changed from his previous examination, opined that he could perform limited-duty work, did not recommend a total knee replacement and opined that 60 percent of appellant's problem was due to his preexisting gunshot wound and 40 percent was due to the March 6, 1978 incident.¹²

On September 25, 1995 the Office determined that Dr. Shah's initial report and its clarification report were still inadequate in addressing the issues in question in the case and that the conflict in medical evidence still existed and it determined that referral of appellant to a new referee specialist for a *de novo* impartial medical examination to resolve the conflict was necessary. By letter dated January 29, 1997, the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the complete case record, to Dr. Tye J. Ouzounian, a Board-certified orthopedic surgeon, for resolution of the existing conflict.

By report dated February 19, 1997, Dr. Ouzounian reviewed appellant's history of employment injury and treatment, reviewed his preexisting injuries and his present complaints,¹³

⁹ Questions posed included whether there were any objective findings of the accepted condition of aggravation of arthritis or right knee strain, whether these objective findings, if present, were still causally related to the March 6, 1978 shoving incident, how could these findings, if present, be distinguished from the normal progression of appellant's underlying preexisting conditions, and whether appellant was able to return to work. The Office also requested rationalized medical explanations supporting his opinions on each of these questions.

¹⁰ This means Dr. Shah did not have the benefit of the complete case record before him at the time of his examination.

¹¹ A new diagnoses was noted, however, which was "dependency on analgesics, muscle relaxants."

¹² However, no medical rationale for this breakdown was provided and no objective bases or testing results supporting this breakdown were cited. Further, most of the questions posed by the Office were not addressed.

¹³ Appellant did admit that he had a Vietnam War gunshot wound, but he alleged that following that he had had absolutely no disability and could function in an unrestricted fashion and had no problems with his knee prior to his employing establishment injury. The Board notes that this allegation is not supported by the fact that the Veterans

performed a complete and detailed review of the medical reports of record, conducted a thorough physical examination and testing and reported the results, reviewed the radiographic evidence and diagnosed “Degenerative arthritis, right knee [and] status post gunshot wound.” Dr. Ouzounian provided a discussion of his findings and opined:

“It is my impression that [appellant’s] present findings referable to his right knee are consistent with his underlying diagnosis of a prior gunshot wound and subsequent development of degenerative arthritis of the knee. It is my impression that [appellant’s] present findings referable to his knee represent entirely and completely the natural progression of his preexisting, nonindustrial gunshot wound suffered in the Vietnam War.”

Dr. Ouzounian noted that in a report dated July 29, 1970, a full eight years prior to the alleged industrial injury, appellant’s complaints then were almost identical to his complaints now. He further noted that appellant’s complaints in 1970 as well as his physical findings, were essentially identical to his current findings. Dr. Ouzounian noted that appellant’s atrophy and enlarged right knee were essentially identical now to his measurements preinjury in 1970 and that there were findings of arthritis and crepitation then as now. Dr. Ouzounian opined that “[appellant’s] present findings referable to his right knee represent entirely and completely the natural progression of a preexisting condition, that of his prior gunshot wound and are in no way related to his alleged industrial injury of March 6, 1978.”

He continued:

“It is my impression that [appellant’s] present findings are clearly documented to represent the natural progression of his preexisting condition and are in no way related to his alleged industrial exposure. I make this statement due to the documented medical records, which clearly state that his findings referable to his knee were essentially identical to his current findings a full eight years prior to his alleged industrial injury and it is, therefore, clear from review of the medical records that [appellant] had significant preexisting arthritis and restrictions referable to his right knee.”

Dr. Ouzounian answered all of the questions posed by the Office, noting that appellant had no objective evidence of his 1978 injury, but that his present findings were entirely and completely a natural progression from his gunshot wound injury and without evidence of significant aggravation, that appellant’s present disability was not related to the 1978 injury and that appellant could not return to work as a mailhandler, but that this was due to his 1968 gunshot injury, its sequelae and its natural consequences. Dr. Ouzounian opined that appellant could work in some semisedentary position and that he would benefit from a total knee replacement, but that any total knee replacement would be due to the preexisting gunshot wound injury and would not be related to the 1978 employing establishment twisting injury.

Administration found that appellant had a 40 percent disability due to the gunshot injury and its sequelae.

By notice of proposed termination of compensation dated May 12, 1998, the Office proposed termination of appellant's compensation on the basis that the weight of the rationalized medical evidence of record established that he no longer suffered disability or residuals causally related to the March 6, 1978 injury. The Office determined that Dr. Ouzounian's thorough and well-rationalized impartial medical examination report, which was based upon a complete and accurate factual and medical background, resolved the existing conflict in medical opinion evidence and established that appellant's present problems were entirely related to his 1968 gunshot wound, its sequelae and its natural consequences and that he had no further disability or injury residuals related to his 1978 twisting knee sprain injury. The Office advised that, if appellant had any disagreement with the proposed action, he should submit further medical evidence or argument to the Office within 30 days.

By letter dated May 16, 1998, appellant argued that the record contained false statements by supervisors and coworkers, that the statement of accepted facts was full of distortions, lies and coverups, that Dr. Frieder gave incorrect information, that Dr. Frieder abused appellant upon examination, that Dr. Ouzounian was an ankle and foot specialist and not a knee specialist, that Dr. Ouzounian did not mention all of the other doctors who had treated appellant since 1968, that Dr. Ouzounian's examination was not long enough, that Dr. Shah's opinion had been adequate and that he was mentally as well as physically unable to work.¹⁴

By decision dated June 17, 1998, the Office finalized the termination of appellant's compensation and medical benefits effective June 21, 1998, finding that he no longer suffers from disability or residuals due to his accepted right knee strain and arthritis aggravation employment injuries.

The Board finds that appellant had no disability or injury residuals after June 21, 1998, causally related to his accepted March 6, 1978 employment injuries.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹⁶ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.¹⁷ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.¹⁸

¹⁴ The Board notes that these arguments are irrelevant to the resolution of the medical conflict and are not supported with any evidence to give them any color of validity.

¹⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

¹⁶ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

¹⁷ *Marlene G. Owens*, 39 ECAB 1320 (1988).

¹⁸ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB

In the present case, the Office met its burden to terminate appellant's compensation, based upon the well-rationalized report of Dr. Ouzounian. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹⁹

Dr. Ouzounian reviewed the complete case record, appellant's history of injury and treatment, his preexisting injuries and conditions and his present complaints: he performed a complete and thorough physical examination including testing and reported the objective results. Dr. Ouzounian diagnosed right knee degenerative arthritis status post gunshot wound and he opined that appellant's present findings were all attributable to his preemployment, preexisting gunshot wound and its natural progression and consequential conditions including, degenerative arthritis of the right knee. Dr. Ouzounian answered all of the questions posed by the Office and opined that appellant's present disability was not related to his 1978 employment twisting injury, but that any disability for work was due to the preexisting gunshot wound injury. Dr. Ouzounian further noted that any further treatment of the right knee would be due solely to the preexisting gunshot wound and its natural progression.

In this case, the Office properly found that Dr. Ouzounian's impartial medical report was thorough, complete and well rationalized and was based upon a proper factual and medical background,²⁰ such that it is entitled to that special weight and that it therefore represented the weight of the medical opinion evidence in establishing that appellant's employment-related disability due to a 1978 right knee strain and aggravation of preexisting arthritis had ceased, that he had no further employment-injury related residuals and that any continuing medical conditions were not related to his employment, but rather were related to his 1968 gunshot wound and its consequences.

1429 (1981).

¹⁹ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

²⁰ It was based upon the statement of accepted facts and a thorough and exhaustive review of the complete case record.

Consequently, the Office has discharged its burden of proof to justify termination of appellant's compensation and medical benefits effective June 21, 1998.²¹

Accordingly, the decision of the Office of Workers' Compensation Programs dated June 17, 1998 is hereby affirmed.

Dated, Washington, D.C.
April 24, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

²¹ Following the formal final decision of the Office, on June 24, 1998 the Office received a follow-up report from Dr. Lawrence, who was on one side of the conflict resolved by Dr. Ouzounian, such that this report would be insufficient to create a further conflict; *see Dorothy Sidwell*, 41 ECAB 857 (1990). This report also merely reiterated his earlier reports and opinions was totally unrationalized as to his conclusions and argued for further orthopedic treatment. The Board notes that such orthopedic care would theoretically be available through the Veterans Administration medical system as the medical problems appellant continues to experience have been determined to be entirely causally related to appellant's 1968 Vietnam War injuries.