U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUY DONOHUE and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GATEWAY JOB CORPS, Brooklyn, NY

Docket No. 99-2269; Oral Argument Held June 21, 2000; Issued August 25, 2000

Appearances: *Guy Donohue, pro se*; *Paul J. Klingenberg, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a left knee injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On April 19, 1996 appellant, then a 58-year-old residential adviser, filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability of his February 10, 1996 employment injury on April 7, 1996. He stated that he slipped running up stairs while on his tour of duty to take care of some disturbance in the male dormitory where he was a residential adviser. Appellant further stated that on the next day he went home from work and that his knee was swollen. He stopped work on April 7, 1996. On the reverse of the claim form, Gilbert Fontana, appellant's supervisor, stated that appellant's knee problems stemmed from an injury incurred prior to appellant's employment at the employing establishment. Mr. Fontana stated that, at the time of both injuries, no witnesses were present at the incidents to provide detailed information.

By letter dated May 15, 1996, the Office advised appellant to submit factual and medical evidence supportive of his recurrence claim. In a May 21, 1996 letter response, appellant requested additional time to submit the requested evidence and authorization for surgery. Appellant also inquired about his request to change physicians. His response was accompanied by a May 8, 1996 note from Dr. John P. Lyden, a Board-certified orthopedic surgeon, indicating that he was under this physician's medical care. Subsequently, in further response to the Office's request, appellant submitted a May 30, 1996 letter providing a description of the incident he experienced on April 6, 1996 rather than April 7, 1996. Appellant indicated that he underwent surgery on his left knee in January 1977 for a torn cartilage, the dates he received

medical treatment and that he had already submitted medical reports to the Office concerning findings before and after the alleged recurrence.

By letter dated June 17, 1996, the Office advised appellant that the April 6, 1996 incident did not constitute a recurrence of disability of his February 10, 1996 injury. Rather, the Office advised appellant that his claim would be treated as a new traumatic injury claim (Form CA-1).

In a June 27, 1996 letter, the Office advised appellant to submit factual and medical evidence in response to specific questions regarding his alleged injury. In a July 25, 1996 letter, appellant stated that he had two witnesses who were present at the time of the occurrence and who were no longer at the employing establishment, that after the injury he finished his tour of duty and went home, that he did not sustain any other injury on or off duty between the first injury and the date he told his supervisor that he did not feel well and went home, and that between the date of his injury and the date he received medical attention his knee had swollen and he was in a great deal of pain. Appellant also stated that on February 10, 1996 he injured the same part of his body and that all medical reports had been submitted to the Office.

By decision dated July 30, 1996, the Office found the evidence of record insufficient to establish that appellant sustained an injury as alleged. In an accompanying memorandum of the same date, the Office found the evidence of record insufficient to establish that the claimed incident occurred at the time, place and in the manner alleged. The Office further found that appellant had failed to submit medical evidence supportive of his claim. In an undated letter received by the Office on August 12, 1996, appellant requested an oral hearing before an Office representative.

The Office received an August 29, 1996 request for authorization for an arthroscopy of the left knee as soon as possible from Dr. Bennett Futterman, a Board-certified orthopedic surgeon, and Dr. Gustavo Rodriguez, a Board-certified orthopedic surgeon.

The Office received Dr. Rodriguez's September 25, 1996 disability certificate providing that appellant was under his care for the left knee and that appellant was unable to return to work for an undetermined period. The Office also received Dr. Rodriguez's October 25, 1996 disability certificate reiterating the findings in his previous disability certificate.

Subsequent to the hearing held on December 19, 1996, appellant submitted medical evidence. Specifically, he submitted the February 16, 1996 medical treatment notes of a physician whose signature is illegible indicating that he fell on the ice in a parking lot at the employing establishment on February 10, 1996. Appellant also submitted Dr. Rodriguez's medical treatment notes from February 22 through July 19, 1996 regarding his left knee. Further, he submitted the April 10, 1996 medical treatment notes of a physician whose signature is also illegible revealing his complaint of left knee pain. In addition, appellant submitted statements from witnesses indicating that he told them that he hurt his knee while running up the stairs at the employing establishment on April 6, 1996. A state workers' compensation form providing a history of the April 6, 1996 employment incident and a request for authorization for arthroscopic surgery on the left knee was submitted by appellant. Dr. Rodriguez's April 11, 1996 medical report indicated a history of appellant's February 10, 1996 employment injury, his findings on physical and objective examinations, and a diagnosis of internal derangement of the

left knee superimposed on osteoarthritis and a radial head fracture of the right elbow. A May 22, 1996 medical note of Dr. David Lichtenstein revealed that he saw appellant in his office on April 10, 1996 for an injury to his left knee and that appellant was referred to Dr. Rodriguez for consultation. Dr. Rodriguez's July 19, 1996 disability certificate provided that appellant was under his care for the left knee and that he may not return to work for an undetermined period of time. Appellant submitted Dr. Lyden's December 16, 1996 medical report revealing that appellant was seen on April 23, 1996 complaining of some catching in his left knee that appellant said he injured in February 1996 and reinjured on April 6, 1996. Dr. Lyden noted appellant's medical treatment, and his findings on physical and objective examinations. He further noted that appellant was advised about arthroscopic debridement and its possible results. He also noted appellant's complaints on a subsequent examination and that appellant would be scheduled for arthroscopic debridement when he received the appropriate authorization for this procedure. Appellant resubmitted Dr. Lyden's May 8, 1996 medical note.

The employing establishment submitted Dr. Rodriguez's July 26, 1996 attending physician's report (Form CA-20) revealing a history of the April 6, 1996 employment incident and a diagnosis of internal derangement of the knee. Dr. Rodriguez indicated that appellant's condition was caused or aggravated by the employment activity by placing a checkmark in the box marked "yes."

By decision dated February 18, 1997, the hearing representative affirmed the Office's July 30, 1996 decision. In so doing, the hearing representative found the evidence of record sufficient to establish that appellant sustained an accident at the time, place and in the manner alleged, but insufficient to establish that he sustained a condition caused by the April 6, 1996 work incident.

On March 18, 1997 the employing establishment submitted appellant's August 2, 1996 claim for compensation on account of traumatic injury or occupational disease (Form CA-7) covering the period June 21, 1996 through that period of time and resubmitted Dr. Rodriguez's July 26, 1996 Form CA-20.

In a letter received by the Office on June 4, 1997, appellant requested reconsideration of the Office's decision. His request was accompanied by an undated medical report of Dr. Hank Ross, a Board-certified orthopedic surgeon, indicating a history of the April 6, 1996 employment incident and appellant's medical treatment. Dr. Ross diagnosed osteoarthritis, complex tearing and macaration in both the medial and lateral menisci. He opined that "these conditions were caused and agivated [sic] by the fall [appellant] took on April 6, 1996." Dr. Ross stated that appellant was totally disabled from his job at that time and he requested written authorization for an arthroscopy of the left knee.

By letter dated June 23, 1997, appellant submitted witness statements, the state workers' compensation form and Dr. Rodriguez's July 26, 1996 Form CA-20, which were previously of record. He also submitted the April 29, 1997 treatment notes of Dr. Jeffrey S. Kaplan, a Board-certified orthopedic surgeon, providing a history of the April 6, 1996 employment incident, appellant's medical treatment and his findings on physical examination. On objective examination Dr. Kaplan found that appellant's knee showed lateral and medial arthritis. He stated that "[i]n my opinion, [appellant] was working and doing well even 20 years or more after

his original problem with his left knee until a new injury on the job on April 6, 1996 is now causally related to the new problem he has been having with his left knee over the last year." Dr. Kaplan then requested written authorization for an arthroscopy of the left knee. In addition, appellant submitted Dr. Ross' revised medical report dated June 23, 1997.[1]

In a decision dated July 7, 1997, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum of the same date, the Office found the medical evidence of record insufficient to establish that appellant sustained a condition caused by the April 6, 1996 employment incident. In a July 1, 1998 letter, appellant, through his attorney, requested reconsideration of the Office's decision. His request was accompanied by Dr. Ross' April 2, 1998 medical report indicating that appellant first presented himself at his office for medical treatment on May 30, 1997 with a chief complaint of severe pain and stiffness in his left knee. Dr. Ross also indicated a history of appellant's previous knee injury, the April 1996 employment incident and appellant's medical treatment. He also indicated a review of medical records and his findings on objective examination specifically, finding that appellant had maceration of the lateral meniscus, as well as, a preexisting osteoarthritic condition. Dr. Ross opined:

> "[S]ubsequently, I do believe that, from the medical history and medical records, [appellant] did not have any prior history of injury to the lateral meniscus and that this injury was solely caused by the fall of 1996. As a result of that injury, he was unable to return to work and complained of persistent pain, swelling and instability preventing him from returning to work.
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> "Additionally, he stated that he had giving way of the knee and that at this time, he does have persistent discomfort and disability in the knee. Therefore, it is my impression that the fall of 1996 was the causal factor with a tear of the lateral meniscus, while it exacerbated a previous preexisting condition of osteoarthritis in the medial joint compartment from his previous injury.
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> "At this time, I feel [appellant] is suffering from tricompartmental arthritis in the knee and that an arthroscopic evaluation and debridement of his knee would not yield significant improvement to him and that he is now, at this time, a candidate for a total knee replacement."

Subsequently, the Office received Dr. Ross' June 27, 1997 medical report providing a history of the April 6, 1997 employment incident and his findings on physical and objective examinations. Dr. Ross opined that appellant was totally disabled at that time. He stated that while appellant would ultimately require a total knee replacement at that time, he did not believe that appellant would experience significant relief from an arthroscopic meniscectomy and synovectomy. Dr. Ross then requested authorization to perform an arthroscopic evaluation of appellant's left knee.

[1] The Board notes that Dr. Ross' June 23, 1997 revised medical report is essentially the same as the undated report appellant submitted with his request for reconsideration that was received by the Office on June 4, 1997.

In a September 30, 1998 decision, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum of the same date, the Office found Dr. Ross' June 27, 1997 and April 2, 1998 medical reports insufficient to establish appellant's burden. By letter dated March 24, 1999, appellant requested an oral hearing before an Office representative. His claim was accompanied by the Office's previous decisions, his current Form CA-2a, correspondence between himself and the Office regarding his Form CA-2a and Dr. Kaplan's April 29, 1997 medical treatment notes, which were previously of record. Appellant's claim was also accompanied by the Office's June 5, 1996 denial of his request for authorization for a left knee arthroscopy. Further, his request was accompanied by an April 10, 1997 report from Dr. Michael A. Nissenbaum, a Board-certified radiologist, regarding the magnetic resonance imaging (MRI) scan results of appellant's left knee, which found advanced osteoarthritic change involving both medial and lateral compartments with milder osteoarthric change at the anterior compartment, complex tearing/degenerative maceration involving both medial and lateral menisci, chronic anterior cruciate ligament deficiency suspected and synovial effusion tracking into a medial popliteal cyst. Additionally, appellant submitted Dr. Kaplan's May 21, 1997 medical treatment notes indicating Dr. Kaplan's discussion with him that he had a preexisting osteoarthritis before his accident, but that the accident aggravated his left knee. Dr. Kaplan noted his findings on physical and objective examinations. He requested a written authorization for a left knee replacement if an arthroscopy of the left knee did not resolve any of appellant's issues. Appellant submitted a history of his left knee injuries covering intermittent periods from 1965 through 1997. Dr. Lyden's December 16, 1996 medical report, Dr. Rodriguez's July 19, 1997 disability certificate and Dr. Ross' April 2, 1998 medical report submitted by appellant were previously of record.

By decision dated June 8, 1999, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed pursuant to section 8124(b)(1) of the Federal Employees' Compensation Act.

The Board finds that this case is not in posture for decision regarding the issue whether appellant has met his burden of proof to establish that he sustained a left knee injury in the performance of duty.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitations period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Daniel J. Overfield*, 42 ECAB 718 (1991).

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] In this case, the Office accepted that appellant sustained an accident at the time, place and in the manner alleged. The Board finds that the evidence of record supports this incident.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[6]

Although the Board has found that appellant sustained the incident at the time, place and in the manner alleged, the case is not in posture for decision with respect to the second component, specifically, whether appellant sustained an injury or any disability as a result of the April 6, 1996 employment incident. In the instant case, the record contains several medical reports from physicians who opined that appellant's left knee condition was caused by the April 6, 1996 employment incident. In his July 26, 1996 Form CA-20, Dr. Rodriguez, a Board-certified orthopedic surgeon, provided a history of the April 6, 1996 employment incident and a diagnosis. He indicated with a checkmark in the box marked "yes" that appellant's condition was caused or aggravated by the employment activity. Dr. Rodriguez did not provide any medical rationale to support his opinion on causal relationship as required.[7] In an undated medical report, Dr. Ross, a Board-certified orthopedic surgeon, provided a history of the April 6, 1996 employment incident and a diagnosis. He opined that "these conditions were caused and agivated [sic] by the fall [appellant] took on April 6, 1996." Drs. Rodriguez and Ross failed to provide adequate medical rationale to support their opinion on causal relationship as required.[8] In his April 2, 1998 medical report, Dr. Ross noted the history of the April 6, 1996 employment incident and provided a diagnosis. He opined:

> "[S]ubsequently, I do believe that, from the medical history and medical records, [appellant] did not have any prior history of injury to the lateral meniscus and that this injury was solely caused by the fall of 1996. As a result of that injury, he was unable to return to work and complained of persistent pain, swelling and instability preventing him from returning to work.
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> "Additionally, he stated that he had giving way of the knee and that at this time, he does have persistent discomfort and disability in the knee. Therefore, it is my

[5] *Elaine Pendleton, supra* note 3.

[6] 20 C.F.R. § 10.110(a); *see John M. Tornello*, 35 ECAB 234 (1983).

[7] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[8] *Id.*

impression that the fall of 1996 was the causal factor with a tear of the lateral meniscus, while it exacerbated a previous preexisting condition of osteoarthritis in the medial joint compartment from his previous injury.

"At this time, I feel [appellant] is suffering from tricompartmental arthritis in the knee and that an arthroscopic evaluation and debridement of his knee would not yield significant improvement to him and that he is now, at this time, a candidate for a total knee replacement."

Dr. Ross appears to implicate an injury to the lateral occurred in the April 6, 1996 employment incident which also aggravated other pathologies in the same joint.

Further, in his April 29, 1997 medical treatment notes, Dr. Kaplan, a Board-certified orthopedist surgeon, noted the April 6, 1996 employment incident and provided a diagnosis. He opined that "[i]n my opinion, the [appellant] was working and doing well even 20 years or more after his original problem with his left knee until a new injury on the job on April 6, 1996 is now causally related to the new problem he has been having with his left knee over the last year."

The medical reports of Drs. Rodriguez, Ross, and Kaplan's medical treatment notes are not sufficiently clear to establish appellant's diagnosed left knee conditions and the precise relationship the April 6, 1990 employment incident imposed on the preexisting conditions of the left knee joint. Nonetheless, the Board finds these medical reports and treatment notes, taken as a whole, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[9] Additionally, the Board notes that in this case, the record contains no medical opinion contrary to appellant's position.

Accordingly, the case will be remanded for further development and a *de novo* decision.[10] On remand, the Office should refer appellant, together with a statement of accepted facts which describes the April 6, 1996 employment incident, and any preexisting conditions, and the medical evidence of record to an appropriate Board-certified specialist or specialists for an examination, diagnosis and a rationalized opinion as to the relationship between appellant's diagnosed condition or conditions and the April 6, 1996 employment incident. After such further development as is deemed necessary, the Office shall issue a *de novo* decision.[11]

The June 8, 1999 and September 30, 1998 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
August 25, 2000

[9] *Horace Langhorne*, 29 ECAB 820-21 (1978).

[10] *Id.* at 822.

[11] In view of the Board's disposition on the issue of whether appellant has met his burden of proof to establish that he sustained a left knee injury in the performance of duty, the issue regarding the timeliness of appellant's request for an oral hearing before an Office representative is moot.

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member