United States Department of Labor
Employees' Compensation Appeals Board

K.B, Appellant	)	
and	)	**Docket No. 06-2106**
	)	**Issued: March 27, 2007**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Parlin, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 7, 2004 appellant filed an appeal from a November 14, 2005 decision of the Office of Workers' Compensation Programs which denied authorization for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUE

The issue is whether the Office properly denied authorization for right knee surgery.

FACTUAL HISTORY

On August 31, 2001 appellant, then a 52-year-old distribution, window and mark-up clerk, filed a Form CA-1, traumatic injury claim, alleging that on that day he injured his left knee when he fell. He did not stop work. By letter dated October 26, 2001, the Office accepted that he sustained a left knee sprain. Magnetic resonance imaging (MRI) scan of the left knee on October 30, 2001 demonstrated a medial meniscus tear and degenerative changes. On April 2, 2002 the Office authorized arthroscopic surgery that was performed on June 19, 2002 by

Dr. Marshall P. Allegra, a Board-certified orthopedic surgeon. Appellant stopped work that day and has not returned. He was placed on the periodic rolls.

In a report dated October 8, 2002, Dr. Allegra advised that appellant's right knee was bothering him due to limping from his left knee injury. A November 15, 2002 right knee MRI scan demonstrated a probable medial meniscal tear, chondromalacia patella and mild joint effusion. Dr. Allegra advised that appellant was totally disabled and that his right knee condition was related to his left knee employment injury because he was limping on the opposite side. He also provided a history that appellant had fallen on both knees on August 31, 2001 the date of injury. On January 8, 2003 appellant's attorney requested authorization for surgery.

By letters dated March 11 and April 3, 2003, the Office informed appellant that right knee surgery was not authorized. In an April 6, 2003 report, an Office medical adviser opined that there was no evidence that appellant's right knee injury was secondary to work, noting that it did not become symptomatic until one year after the employment injury. The Office determined that a conflict in medical evidence was created between the opinions of the Office medical adviser and Dr. Allegra regarding appellant's right knee condition. On May 20, 2003 it referred him to Dr. Norman M. Heyman, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated June 3, 2003, Dr. Heyman noted his review of the record and appellant's report that he fell on both knees on August 31, 2001. He reported that appellant's height was 5 feet 11 inches and weight 350 pounds. Range of motion was limited in both knees with pain and tenderness on examination. Dr. Heyman diagnosed contusions of the right and left knee, post arthroscopic surgery to the left knee and patellofemoral syndrome bilaterally with poor conditioning and decreased strength and normal muscle function. Regarding the right knee, he advised that the employment injury precipitated or accelerated a preexisting degenerative condition. Dr. Heyman opined that appellant could not perform his regular job duties but could work part-time light duty for four to six hours a day and recommended a strengthening program with work hardening of the lower extremities. In an attached work capacity evaluation, he advised that appellant could work four to six hours daily with walking, standing and reaching limited to one to two hours daily.

In a work capacity evaluation dated June 17, 2003, Dr. Allegra advised that appellant could not work due to chronic pain and swelling of both knees and in a treatment note dated June 24, 2003 advised that x-ray demonstrated that he had degenerative changes in his right ankle.

The Office determined that a conflict had been created between the opinions of Dr. Allegra and Dr. Heyman regarding whether appellant was totally disabled, whether his right knee condition was a consequence of the August 31, 2001 employment injury and whether right knee surgery should be authorized. On August 11, 2003 the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon.[1]

[1] Dr. Heyman and Dr. Dennis were provided with the medical record, a set of questions and a statement of accepted facts.

In a report dated August 28, 2003, Dr. Dennis noted his review of the record, including the statement of accepted facts, the history of injury and appellant's complaints of daily pain in both knees with a buckling right knee. Gait was normal. Dr. Dennis reported that appellant performed a deep knee bend to 40 degrees, holding a table for balance only. No crepitus was present. Examination of the left knee demonstrated arthroscopic scars, excellent stability and alignment with minimal tenderness and effusion. Dr. Dennis stated that he "carefully examined the right knee repeatedly and extensively." Findings included mild medial joint line tenderness and lateral joint line tenderness, consistent with the left. Dr. Dennis advised that there was no detectible fluid in the right knee and no effusion and stated that he watched appellant sit, get up from sitting and sit back down again several times, noting that he did so without the need to hold onto something. The remaining orthopedic examination was unremarkable. Dr. Dennis diagnosed meniscal tear and other damage secondary to a contusion of the left knee, directly related to the work-related injury of August 31, 2001, status post appropriate and successful arthroscopic surgery, left knee, for torn meniscus, status post significant contusion left knee and mild contusion right knee, secondary to the August 31, 2001 work-related accident, generalized preexisting patellofemoral arthritis both knees; alleged associated work-related tear of the medial meniscus of the right knee, alleged chondromalacia of the patella, right knee. He reviewed the November 15, 2002 MRI scan and noted that it was performed over a year after the August 31, 2001 injury and that appellant, who was obese, had worked until his left knee surgery and initially had minimal if any complaints regarding his right knee. Dr. Dennis further noted the radiologist's finding of probable tear and other findings that were age-related and not associated with the August 31, 2001 fall. He also noted his review of the June 19, 2002 operative findings of degenerative changes which he opined preexisted the employment injury. In answers to specific Office questions, Dr. Dennis advised that there was not enough substantiating evidence to justify surgery on the right knee and that appellant's right knee condition was not related to the fall at work based on the timing of the onset of significant symptoms. He further stated that, even if appellant sustained a right meniscal tear in August 2001, one would anticipate further progression than was described in the November 2002 MRI scan and concluded that the tear was an incomplete evolutional tear secondary to appellant's weight and preexisting conditions. Dr. Dennis advised that the fall could have minimally aggravated his right knee but that the condition would have evolved regardless of the fall and that he had minimal, if any, objective findings regarding his right knee. He stated that there were no clinical findings to suggest that a torn cartilage, even if it did exist, was producing symptoms. Dr. Dennis noted that appellant needed no further treatment, therapy or medication for either knee and could return to light-duty for four to six hours a day, three days a week, with intermittent sitting and standing, eventually progressing over a period of a month or two into full duty and recommended that he lose weight. Dr. Dennis repeated these recommendations in an attached work capacity evaluation.

Dr. Allegra submitted reports advising that appellant was totally disabled and needed right knee surgery.

By decision dated September 17, 2003, the Office denied authorization for right knee surgery.

On September 23, 2003 appellant, through counsel, requested a hearing and submitted an April 19, 2004 report from Dr. Allegra who reiterated his opinion that appellant's right knee condition was caused by the August 31, 2001 employment injury and that it needed to be treated

surgically. At the hearing, held on April 22, 2004, appellant testified that he fell on both knees on August 31, 2001. He contended that Dr. Dennis' examination was cursory, he did not review the actual MRI scan and did not perform a McMurray's test. Appellant testified that he held on when performing the deep knee bend test.

In a July 13, 2004 decision, an Office hearing representative found that the medical evidence established that the injury to appellant's left knee on August 31, 2001 caused him to put increased weight on his right knee which precipitated or accelerated patellofemoral syndrome of the right knee which preexisted the August 31, 2001 fall. He remanded the case for a supplementary report from Dr. Dennis who was to be provided with an amended statement of accepted facts, was to review the actual November 14, 2002 MRI scans, was to be asked if he performed a McMurray's test and was to explain whether appellant was able to perform the deep knee bend test unassisted.

By letter dated October 7, 2004, the Office submitted an amended set of facts to Dr. Dennis.[2] He was asked if the MRI scan demonstrated a medial meniscus tear that would be amenable to surgical repair, whether he performed a McMurray's test and, if so, was it positive, if he did not perform the test, to explain why was it possible that appellant placed weight on his arms when performing the deep knee bend and did not use the table merely for balance. Dr. Dennis was asked to address whether the proposed right knee surgery was medically indicated and whether the physical restrictions provided on August 28, 2003 were still valid. He was provided with the November 15, 2002 MRI scans.

In an October 15, 2004 report, Dr. Dennis noted the accepted right knee condition. He reviewed all 200 cuts of the November 14, 2002 MRI scan and advised that he did not see a meniscal tear, opining that it appeared to be degeneration within the body of the medial meniscus consistent with appellant's age and weight. The abnormality did not reach the superior or inferior surface of the meniscus which he characterized as degenerative changes associated with age. Upon examination of the patellofemoral joint Dr. Dennis stated that he found minimal if any chondromalacia of the patella, again noting very mild long-standing preexisting degenerative changes of the patella with no evidence of patellofemoral effusion or prepatellar bursitis. Following his review of the MRI scan, Dr. Dennis concluded:

> "Having reviewed these films, I can, with certainty, take out the word probable tear of the posterior horn of the medial meniscus and replace it with interbody mucoid degeneration of the medial meniscus, totally explainable and consistent with [appellant's] age and weight without having to postulate injury."

Dr. Dennis advised that the MRI scan did not substantiate a need for surgery and noted that he had performed a McMurray's test, Lachman test, drawer sign, *etc*. as part of his routine examination. He stated that it was his normal practice to note significant, pertinent, positive findings and, as the McMurray's test was negative bilaterally, he did not record the result.

[2] The statement of accepted facts included in the letter provided that appellant fell on both knees on August 31, 2001 underwent authorized left knee arthroscopy on June 19, 2002 and the left knee injury caused him to put increased weight on his right knee which precipitated or accelerated patellofemoral syndrome of the right knee which preexisted the August 31, 2001 fall.

Dr. Dennis opined that this test was not definitive for a diagnosis of a torn cartilage, particularly in a patient of appellant's age and weight. He advised that he would have noted if appellant placed weight on his arms during the deep knee bend, stating that he had 30 years experience as a clinical observer and did not think appellant was doing anything other than holding onto the table for balance. Even if appellant were holding onto the table, this would not change his opinion regarding the need for surgery on his right knee. Dr. Dennis stated:

> "Based on the examination of this new material which of course, are the MRI [scans], based on the examination of [appellant's] right knee [described] on page five of my prior report, based on this history of the injury and the overall examination, it is my opinion that right knee surgery is not indicated. It certainly was not indicated as of August 28, 2003. If it ever were to become indicated, such indications, in my opinion, would not be relatable back to having any relationship to the August 31, 2001 injury."

Dr. Dennis concluded that he saw no need to reexamine appellant and advised that the physical restrictions described on August 28, 2003 remained in place.

By decision dated November 24, 2004, the Office found that the weight of the medical evidence rested with Dr. Dennis who found that appellant did not have a right knee meniscal tear and denied authorization for right knee surgery.

On November 30, 2004 appellant, through his attorney, requested a hearing and submitted August 18, 2005 reports in which Dr. Allegra reiterated his opinion that the slip and fall of August 31, 2001 caused meniscal tears in both knees with post-traumatic arthritis. Dr. Allegra advised that until his current examination, he had not seen appellant in several years and noted findings on examination and his disagreement with Dr. Dennis' opinion. He concluded that appellant continued to be totally disabled and needed surgery on his right knee.

Appellant did not appear at the hearing held on September 7, 2005. Counsel argued that Dr. Dennis may have been presented limited accepted facts since he may not have reviewed the April 3 and July 2, 2003 statement of accepted facts and merely the additional accepted facts were included in the Office's October 17, 2004 letter. He also questioned Dr. Dennis' statement that he performed a McMurray's test and argued that his report was not sufficiently rationalized to serve as a referee examination.

By decision dated November 14, 2005, an Office hearing representative affirmed the November 24, 2005 decision. She found that the Office complied with the July 13, 2004 remand order by incorporating the essential accepted facts in its October 17, 2004 letter. The hearing representative also found Dr. Dennis' report regarding the McMurray's test and deep knee bend examination credible and his opinion based upon review of the November 14, 2002 MRI scan. Authorization for surgery of the right knee was denied.

LEGAL PRECEDENT

Section 8103 of the Federal Employees' Compensation Act[3] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[4] While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[5]

In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the Office's authority being that of reasonableness.[6] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[7] In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.[8] Proof of causal relationship must include supporting rationalized medical evidence. In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[9]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[10] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination, and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[11] In situations where there are opposing medical reports of

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

[5] *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

[6] *James R. Bell*, 52 ECAB 414 (2001).

[7] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[8] *Cathy B. Mullin*, 51 ECAB 331 (2000).

[9] *Id.*

[10] 5 U.S.C. § 8123(a); *see Roger G. Payne*, 55 ECAB 535 (2004).

[11] 20 C.F.R. § 10.321.

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 on a proper factual background, must be given special weight.[12]

ANALYSIS

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Dennis who opined that right knee surgery was not medically warranted or due to an employment-related condition. Dr. Dennis initially provided a comprehensive report dated August 28, 2003 which discussed his review of the record, including the statement of accepted facts appellant's complaints and his examination findings. He advised that the August 31, 2001 fall could have minimally aggravated appellant's right knee but that the condition would have evolved regardless of the fall. Appellant had minimal, if any, objective findings regarding his right knee. Dr. Dennis noted that there were no clinical findings to suggest that a torn cartilage which, if it did exist, was producing symptoms. He stated that appellant needed no further treatment, therapy or medication for either knee. Dr. Dennis did not believe that appellant had a right meniscal tear or that surgery was warranted.

The Office accepted that appellant's left knee injury of August 31, 2001 caused him to put increased weight on his right knee which precipitated or accelerated patellofemoral syndrome of the right knee which preexisted the August 31, 2001 fall. By letter dated October 7, 2004, the Office requested that Dr. Dennis provide a supplementary report. In an October 15, 2004 report, Dr. Dennis noted his review of the amended set of facts which included the accepted right knee condition and the November 14, 2004 right knee MRI scan. Dr. Dennis advised that, upon review of 200 individual cuts from the MRI scan, he did not see a meniscal tear, advising that the MRI scan demonstrated interbody mucoid degeneration of the medial meniscus which was explainable by and consistent with appellant's age and weight and not due to a traumatic injury. Dr. Dennis advised that it was his normal practice to note significant, pertinent, positive findings, that appellant's McMurray's test was negative bilaterally. Based on 30 years experience as a clinical observer appellant was merely holding onto the table for balance during his deep knee bend and, that even if he were holding onto the table this would not change Dr. Dennis' opinion regarding the need for surgery on appellant's right knee. Based on his review of the medical record, including the November 14, 2002 MRI scans, Dr. Dennis' examination of appellant's right knee, the history of the injury and appellant's overall examination, right knee surgery was not warranted and would not be due to the August 31, 2001 employment injury.

As noted above, a reasoned opinion from a referee examiner is entitled to special weight.[13] Appellant, through his attorney, argued at the hearing that the reports of Dr. Dennis were not well rationalized. The Board, however, finds that Dr. Dennis provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record, including the November 14, 2004 MRI scans and findings on physical examination. Dr. Dennis found that right knee surgery was not medically warranted and, if appellant's right knee condition progressed to the need for surgery, it was not related to the

[12] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[13] *Id*.

accepted employment injury. The Board finds that the opinion of Dr. Dennis entitled to special weight and represents the weight of the evidence.[14]

Subsequent to the November 24, 2004 decision, appellant submitted an August 18, 2005 report in which Dr. Allegra reiterated his opinion that appellant was totally disabled and needed right knee surgery. Dr. Allegra, however, was on one side of the conflict of medical evidence resolved by Dr. Dennis. The Board has long held that an additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, are insufficient to overcome the weight accorded to an impartial medical specialist's report.[15] The Board finds that Dr. Allegra's August 18, 2005 report is insufficient to overcome the weight accorded the well-rationalized opinion of Dr. Dennis. The evidence of record does not establish that the proposed right knee surgery is either medically necessary or for treatment of an employment-related condition.[16] Accordingly, the Office did not abuse its discretion under section 8103 of the Act in denying authorization for the proposed right knee surgery.[17]

CONCLUSION

The Board finds that the Office properly denied authorization for the recommended surgical procedure to appellant's right knee.

[14] *Cathy Mullin, supra* note 9.

[15] *Roger G. Payne, supra* note 10.

[16] *Cathy B. Mullin, supra* note 8.

[17] *R.C.*, 58 ECAB ____ (Docket No. 06-1676, issued December 26, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2005 be affirmed.

Issued: March 27, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board