

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

T.K., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Denver, CO, Employer**

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**Docket No. 12-1100
Issued: December 18, 2012**

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2012 appellant, through his attorney, filed a timely appeal of a November 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained a consequential right knee injury as a result of his accepted left knee condition.

On appeal, counsel argued that the impartial medical examiner was disqualified by his bias due to constant use as a second opinion physician by OWCP. He further argued that the statement of accepted facts was flawed due to the inclusion of the second opinion physician's report and that the medical examiner's opinion was conditional and based on a misunderstanding of appellant's medical history.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On July 19, 1991 appellant, then a 32-year-old clerk, working light-duty due to a nonemployment-related right knee condition, filed a traumatic injury claim alleging on that date he turned a corner while carrying a parcel and his left knee popped. OWCP accepted his claim for torn meniscus in the left knee and left knee strain noting a preexisting right knee condition. Appellant received a schedule award for five percent impairment of his left leg in 1995. OWCP terminated his compensation benefits by decision dated September 25, 1995 on the grounds that he refused suitable work. Appellant appealed this decision to the Board. By decision dated August 12, 1999, the Board reversed the September 25, 1995 decision.²

On March 21, 2001 appellant filed a recurrence of disability claim alleging that both knee conditions had worsened and that he was considering a disability retirement. OWCP accepted that he had sustained a recurrence of disability on January 25, 2001. It granted appellant a schedule award for 26 percent impairment of his left leg on July 9, 2002 less than 5 percent previously issued.

Appellant underwent a right knee total arthroplasty on May 5, 2004. In a decision dated December 17, 2004, the Branch of Hearings and Review remanded the case to OWCP to pay compensation benefits beginning January 25, 2001. It was also directed to adjudicate the claim for a consequential emotional condition and a consequential aggravation of the preexisting right knee condition.

Appellant's physicians from the Department of Veterans Affairs supported a causal relationship between his right knee replacement and accepted left knee condition. The second opinion physicians selected by OWCP found that there was no causal relationship between appellant's right knee replacement and his accepted left knee injury. Due to the opposing opinions, OWCP found a conflict of medical opinion requiring referral to an impartial medical examiner. In a decision dated August 27, 2009, it found that the weight of the medical evidence represented by an impartial medical examiner's report established that appellant did not have a consequential right knee injury. Appellant requested review by the Board. By decision dated December 6, 2010,³ the Board found that the impartial medical specialist was improperly selected and there remained an unresolved conflict of medical opinion. The Board remanded the case for resolution of the conflict. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On February 16, 2011 OWCP listed the physicians already involved in the case. It referred appellant for an impartial medical examination by Dr. John Douthit, a Board-certified orthopedic surgeon, on February 24, 2011. OWCP provided a ME023 Appointment Schedule Notification dated February 24, 2011 advising that Dr. Douthit was selected through the Medical Management Application process.

² Docket No. 97-2141 (issued August 12, 1999).

³ Docket No. 10-445 (issued December 6, 2010).

OWCP used the statement of accepted facts dated February 9, 2007. It listed appellant's July 19, 1991 employment injury to the left knee and November 11, 1991 left knee surgery. The statement of accepted facts also included the surgical history of appellant's right knee as well as the job requirements of his date-of-injury position. In an addendum to the statement of accepted facts dated January 7, 2009, OWCP noted that appellant was not working and underwent second opinion evaluations in 2007.

In a letter dated February 27, 2011, counsel requested documentation regarding the selection of Dr. Douthit. OWCP responded on March 30, 2011 and noted the physicians bypassed in the selection of Dr. Douthit and the reasons for their bypass. On March 23, 2011 appellant stated that he missed the appointment with Dr. Douthit and that he rescheduled the appointment for March 28, 2011.

In a report dated March 21, 2011, Dr. Douthit noted a history of appellant's right knee injury in 1978 while he was in the Navy. Appellant reported that his right knee problems intensified after a left knee injury in July 1991. He had previously depended on his left knee for stability but after the 1991 injury, he put more stress on the right knee causing grinding and pain. Dr. Douthit performed a physical examination and found good alignment of the right knee and five degrees of varus of the left knee. He found no joint effusion or swelling in either knee with good stability. Appellant also had a slight loss of extension of the left knee.

Dr. Douthit reviewed the medical records and noted appellant's history of eight right knee surgeries due to reconstruction of the anterior cruciate ligament and loose bodies, cartilage tears and persisting pain. Appellant sought treatment for right knee pain in January and March 1991 with reports of bone on bone degeneration. Dr. Douthit further noted that appellant injured his left knee in July 1991. He found that appellant was having significant pain and mechanical symptoms of his right knee four months before the left knee injury. Dr. Douthit stated:

“In my interpretation of the status of the right knee in 1991 was that it was nearly at end stage [osteoarthritis] of the medial joint with severe cartilage loss being reported by the arthroscopic surgery in 1988, x-rays of the time showing medial joint narrowing and an orthopedic examiner reporting bone on bone sensation in examining the knee with varus stress. This indicates to me a fairly rapid and progressive deterioration and already a steep time line. By the mid-1990's the doctors were optioning salvage reconstruction of the knee with a high tibial osteotomy, being reluctant to do a [total knee replacement] because of his age. There was already a rapid acceleration of the deterioration of his knee and I do not see that this increased after the injury in 1991 *regarding* of how one may argue the possible change in gait and kinematics that may or may not have been changed of the injury of his left knee in July 1991.”

Dr. Douthit concluded that the problems of appellant's right knee did not increase or accelerate after July 1991 as appellant's right knee problems were far advanced and were not directly related to the injury to the left knee. He noted in a postscript that appellant reported an additional surgery on August 1, 1992. Dr. Douthit was unable to locate a report of this surgery and stated, “this is an important document and would very likely give a snapshot of the condition of the right knee visually by an orthopedic surgeon

at the time he was claiming aggravation.” He stated that he would review this note if located and provide a supplemental report.

By decision dated April 6, 2011, OWCP denied appellant’s claim for a consequential right knee injury relying on Dr. Douthit’s March 21, 2011 report.

On April 25, 2011 appellant requested an oral hearing, before an OWCP hearing representative. Counsel argued that Dr. Douthit should be disqualified as he had performed second opinion evaluations over 300 times resulting in bias. He further contended that the statement of accepted facts was flawed as it discussed administrative actions, like the second opinion evaluations. Counsel also stated that Dr. Douthit’s opinion was based on an improper factual background.

OWCP responded to a Freedom of Information Act request on May 9, 2011. It noted that Dr. Douthit had performed 305 second opinion examinations from December 2003 through March 2011.

In a letter dated August 18, 2011, counsel stated that appellant was unable to locate the records for his August 1, 1992 right knee surgery.

On August 24, 2011 appellant testified that after this left knee injury he began putting more weight on his right leg and it became worse, with swelling. He attributed the increased right knee symptoms to working on a concrete floor at the employing establishment. Appellant stopped work in 2001 on a disability retirement.

Following the oral hearing, appellant submitted a November 9, 1992 bone scan which demonstrated active metabolical bone process involving the right knee which was possibly related to accelerated degenerative changes. A report dated February 5, 1993 stated that due to bilateral knee problems, he should not walk on concrete.

By decision dated November 16, 2011, OWCP’s hearing representative found that Dr. Douthit was properly selected to serve as the impartial medical examiner. The fact that Dr. Douthit had served as a second opinion physician in other OWCP cases did not render him incapable of serving as an impartial medical examiner. The hearing representative found no errors with the statement of accepted facts. He found that Dr. Douthit’s report constituted the special weight of the medical evidence and established that appellant did not sustain a consequential injury.

LEGAL PRECEDENT

It is an accepted principle of workers’ compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee’s own intentional conduct. As is noted by Larson in his treatise on workers’ compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the

progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.⁴

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁵

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁶

ANALYSIS

Appellant alleged that he developed an aggravation of his preexisting right knee condition as a consequence of his accepted left knee injury and surgery. Due to a conflict of medical opinion, he was referred for an appropriate impartial medical examination.

Counsel argued that Dr. Douthit was not properly selected as a medical examiner because he had frequently served as a second opinion physician. OWCP procedures provide, "The mere fact that a physician has conducted a second opinion examination in connection with FECA program does not eliminate that physician from serving as an impartial referee physician in another case."⁷ Counsel argued that as Dr. Douthit had completed 305 second opinion examinations in seven years he should be a physician who regularly reviews cases for OWCP and placed under written agreement.⁸ Appellant has not provided demonstration of bias on the part of Dr. Douthit. The Board finds that the record does not support bias in this case.

On appeal and before OWCP's hearing representative, counsel argued that the statement of accepted facts was flawed as it contained mention of two second opinion examinations. OWCP provided Dr. Douthit with a statement of accepted facts dated February 9, 2007 and an addendum dated January 7, 2009. These documents comply with OWCP procedures as the facts included are appellant's employment injury and November 11, 1991 left knee surgery. The statement of accepted facts also included the surgical history of appellant's right knee as well as

⁴ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

⁵ *Charles W. Downey*, 54 ECAB 421 (2003).

⁶ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4b (July 2011).

⁸ *Id.* at Chapter 3.900.2d (October 1990).

the job requirements of his date-of-injury position.⁹ OWCP included an addendum to the statement of accepted facts dated January 7, 2009 which noted that he was not working and underwent second opinion evaluations in 2007. Counsel objected to the listing of these examinations as administrative actions.¹⁰ The Board does not agree with this classification of the second opinion examinations as there is no discussion of appeals, remands or other administrative actions of OWCP but instead the medical history of the claim which may properly be included.¹¹

In his March 21, 2011 report, Dr. Douthit provided an accurate history of injury, including appellant's preexisting right knee condition and surgeries. He noted appellant's assertion that after the left knee injury he put more stress on the right knee causing grinding and pain which hastened his need for a total knee replacement on the right. Dr. Douthit examined appellant and found five degrees of varus of the left knee as well as slight loss of extension of the left knee. In reviewing the medical records, he noted that appellant sought treatment for right knee pain in January and March 1991 with reports of bone on bone degeneration. Dr. Douthit found that appellant was having significant pain and mechanical symptoms of his right knee four months before the left knee injury. He concluded that appellant already had severe cartilage loss of the right knee prior to the left knee injury and that this condition was not changed or accelerated after the left knee injury.

As noted above, the Board finds that Dr. Douthit's report is based on a proper factual background. Dr. Douthit provided a detailed review of the medical history and appellant's preexisting right knee condition. He opined based on the medical records appellant required a right knee replacement before he injured his left knee in the performance of duty. Dr. Douthit further opined that the left knee injury did not accelerate or impact appellant's right knee condition. He found that appellant's accepted employment injury did not result in a consequential aggravation or acceleration of his preexisting right knee condition. Dr. Douthit provided detailed review and findings upon which he based his conclusion. The Board finds that this report is sufficiently rationalized to carry the weight of the medical opinion evidence and resolve the conflict regarding appellant's alleged consequential right knee injury.

Counsel's final argument on appeal and before OWCP's hearing representative is that Dr. Douthit's opinion was conditional as he mentioned record evidence of additional right knee surgery on August 1, 1992. Dr. Douthit stated that if the surgery had occurred the operative report would provide him with further information regarding the condition of appellant's right knee. He offered to review this note if located and provide a supplemental report. Appellant was not able to locate records of a surgery on this date. The Board finds that Dr. Douthit did not state that his report was incomplete without this evidence, but merely stated that he would be available to review the documents if found. As stated above, Dr. Douthit provided a detailed review of the medical records, a physical examination and offered a clear opinion with reasoning

⁹ Federal (FECA) Procedure Manual, Part -- 2, Claims, *Statement of Accepted Facts*, Chapter 2.809.5-7 (September 2009).

¹⁰ *Id.* at Chapter 2.809.7h.

¹¹ *Id.* at Chapter 2.809.7c.

that appellant's right knee condition was not aggravated or accelerated by his left knee injury. Due to this report, the Board finds that appellant has not met his burden of proof in establishing a consequential right knee injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof in establishing that he sustained a consequential right knee injury as a result of his accepted left knee condition.

ORDER

IT IS HEREBY ORDERED THAT November 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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