

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

B.U., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grants Pass, OR, Employer**

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**Docket No. 14-1837
Issued: August 27, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2014 appellant filed a timely appeal from two July 14, 2014 merit decisions 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 this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that his left hip arthroplasty was causally related to his accepted employment-related injury; and (2) whether appellant met his burden of proof to establish total disability for the periods June 26 to September 4, 2012 and April 4 to May 30, 2014 due to his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 25, 2013 appellant, then a 58-year-old city mail carrier, filed an occupational disease claim alleging that he suffered from right hip deterioration as a result of years of delivering mail and walking routes. On July 31, 2013 he filed a claim alleging that his years of delivering mail also caused left hip deterioration.

In a May 31, 2012 office visit report, Dr. James R. Van Horne, a Board-certified orthopedic surgeon, noted that he saw appellant for counseling with regard to an upcoming right total hip replacement. He diagnosed appellant with degenerative joint disease of the hip and ordered further x-rays. Dr. Van Horne noted a family history of hip replacement. He opined that appellant was an excellent surgical candidate. Dr. Van Horne performed a direct anterior approach right total hip replacement with excision of heterotopic bone on June 26, 2012. Appellant also submitted the hospital and operative notes detailing his hospital course from June 26 to 28, 2012.

In progress notes dated from May 7, 2012 through June 13, 2013, Dr. Jon Edwin Lloyd Ermshar, a Board-certified family practitioner, assessed appellant with degenerative joint disease in right ankle and hip; lumbosacral intervertebral disc; rotator cuff sprain; chronic pain syndrome, osteoarthritis; gastroesophageal reflux stable; stable dyslipidemia; hyperglycemia; essential hypertension; and insomnia.

The record also contains numerous reports by Dr. Ermshar's physician assistant, Michael Swartz, dated from November 7, 2012 through April 24, 2013, as well as notes by nurse practitioners Patricia L. Mecum and Deborah Rossell. In addition, appellant underwent intermittent periods of physical therapy from June 8, 2012 through July 17, 2014, and the record contains reports by his physical therapists.

In an April 16, 2013 statement, appellant indicated that he had been a city carrier for 14½ years and a rural carrier prior to that for 2½ years. He detailed his job duties, discussed how these duties placed strain on his hips, noted that his hips began to hurt at the end of his route, and stated that it was his belief that his work duties contributed greatly to his hip condition. Appellant noted that he was currently working normal hours and the employing establishment was providing accommodations while he recovered.

On September 19, 2013 OWCP accepted appellant's claim for temporary aggravation of bilateral preexisting primary localized osteoarthritis of the hips.

In a January 9, 2014 progress note, Dr. Ermshar noted work-related acceleration of pathology and disability in the left hip. He also assessed appellant with left bilateral osteoarthritis, localized, pelvic region and thigh. Dr. Ermshar noted that the right hip is now stable, but the left was now worsening and was intolerable for activities of daily living and work.

In a January 9, 2014 report, an OWCP medical adviser noted that appellant had undergone a right total hip replacement for degenerative arthritis on June 26, 2012. He opined that a review of the record did not reveal any significant objective evidence of disease of the left hip that is of sufficient severity to warrant hip replacement, and indicated that he would deny the

request for authorization on the grounds of insufficient evidence of disease. In a January 23, 2014 report, the medical adviser found that the prior right hip surgery was justified, but found no relationship between the total hip arthroplasty of June 26, 2012 and appellant's employment or any employment-related injury, either by direct cause or aggravation. On January 22, 2014 appellant filed a claim (Form CA-7) for leave buyback for the period June 26 through September 4, 2012.

In a February 12, 2014 progress note, Dr. Ermshar assessed appellant with chronic left bilateral osteoarthritis, localized, primary, pelvic region and thigh worsening. He listed appellant's employment as a mail carrier walking up to 10 miles a day and carrying 50-pound bags of mail for eight hours a day five days a week. Dr. Ermshar noted that retrospective considerations over the past several months to one year brought him and appellant to the conclusion that his right hip osteoarthritis and now his left hip osteoarthritis are causally and directly related to his employment over the past two decades and have been responsible to a degree greater than 51 percent for his worsening and disabling osteoarthritis.

A February 18, 2014 progress note by Dr. James Dowd, a Board-certified orthopedic surgeon, revealed that appellant has had progressive worsening of the left hip pain for the past two years. Dr. Dowd noted that appellant had a successful right anterior approach total hip arthroplasty in June 2012. He assessed appellant with hip pain and hip arthritis.

In an April 13, 2014 attending physician's report, Dr. Ermshar stated that appellant had degenerative arthritis of the hip. He checked a box indicating that he believed this was caused or aggravated by employment activities.

On April 2, 2014 OWCP referred appellant to Dr. Mark Weston, a Board-certified orthopedic surgeon, for a second opinion. In an April 30, 2014 opinion, Dr. Weston concluded that appellant had left-sided, left hip osteoarthritis. He noted objective signs of disease are ankylosis of the left hip, limited range of motion and pain, a limp, and x-ray that showed osteoarthritis. With regard to whether this condition was causally related to appellant's employment, Dr. Weston stated that medical science suggests that arthritis severity and incidents are independently associated with age and race alone, and not with increased activities. He opined that there was nothing in appellant's case that would lead him to believe that his left hip condition was not genetic osteoarthritis, which is likely an inborn cartilage resilience problem as evinced by the family history of hip arthritis in his mother. Dr. Weston also noted that appellant was at an average age for the appearance of symptoms. He noted that appellant did have physical signs of hip stiffness and pain with a positive extension and pain with internal rotation. Dr. Weston concluded that, based on basic science literature and clinical experience, osteoarthritis symptoms are worsened with activities but not caused by activity. He did opine that appellant would continue to feel pain as long as he continued to walk on painful hips. Dr. Weston concluded that appellant's right hip surgery was not performed under workers' compensation coverage, and that he saw no reason to include it retroactively or to include surgery to his left side in OWCP's system.

In a June 23, 2014 supplemental opinion, Dr. Weston responded to OWCP's request for clarification. He opined that appellant's left total hip arthroplasty was not necessitated by his work activities. Dr. Weston noted that appellant's left hip has not been treated, and that his right

hip had been treated and is at maximum medical improvement. He noted that appellant's left hip continues to have degenerative joint disease. Dr. Weston opined that the proximate cause of appellant's left hip degenerative joint disease is a genetic cartilage resilience problem. He noted that molecular change within the cartilage causes increased fluid attraction, causing cartilage softening, which causes cartilage wear and inflammation, which is the cause of the arthritis of degenerative joint disease. Dr. Weston noted that this would occur with or without his work activities and did in fact occur without work activities in his mother who had early hip degenerative joint disease and hip replacement. He stated that to his knowledge, work activities, aside from trauma, have never been shown to be the cause of cartilage problem which is the cause of appellant's symptoms. Dr. Weston did recommend the left hip replacement.

On January 22, 2014 appellant filed a claim for leave buyback from June 26 through September 4, 2012.² This leave was requested for recovery from his right hip replacement on June 26, 2013. On April 16, 2014 appellant filed a claim for compensation for the period April 4 to 18, 2014.³ Subsequent claims were filed for compensation for the period April 19 through May 30, 2014. These requests were for periods prior to his total left hip arthroplasty of June 11, 2014, and included requests for time off due to physician's restrictions.

By decision dated July 14, 2014, OWCP denied appellant's claim for disability for leave buyback for the period June 26 to September 4, 2012, as the evidence failed to support employment-related disability. In another decision, also dated July 14, 2014, OWCP denied appellant's claim for a left hip arthroplasty and compensation for disability for the period April 4 to May 30, 2014.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA 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 that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.⁴ While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁵

² Appellant noted that he took eight hours of sick leave on June 27, 28, 29, and 30, 2012; July 2, 5, 6, 7, 9, 10, 11, 13, 14, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, and 31; and August 1, 2, 3, 4, 6, 8, 9, 10, 11, 13, 14, 16, 17, 18, 20, 21, 22, 24, 25, 27, 28, and 29, 2012.

³ Appellant noted that he took eight hours of sick leave on April 4, 5, 7, 8, 9, and 10, 2014, and eight hours of leave without pay on April 14, 15, 16, 17 and 18, 2014. He requested leave for eight hours a day on April 14, 15, 16, 17, and 18, 2014. Appellant also requested compensation for part days in May 2014 as follows: May 19 for 4.75 hours, May 20 for 5.78 hours, May 21 for 6.25 hours, May 22 for 5.75 hours, May 27 for 1.14 hours.

⁴ 5 U.S.C. § 8103(a).

⁵ See *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004); *Debra S. King*, 44 ECAB 203, 209 (1992). *J.B.*, Docket No. 10-1073 (issued February 24, 2011).

Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.⁶ Therefore, in order to prove that the surgical procedure was warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for temporary aggravation of preexisting primary localized osteoarthritis of bilateral hips. Appellant underwent a right hip replacement on June 26, 2012, prior to his filing a claim. He later claimed compensation and medical benefits for surgery to his left hip.

The Board finds that appellant has not established that the proposed left hip arthroplasty was causally related to his accepted medical condition or to the duties of his federal employment. Dr. Ermshar opined that appellant's bilateral osteoarthritis was causally related to his employment. However, he failed to provide a well-rationalized medical opinion explaining how the proposed left hip surgery was necessitated due to his federal employment. An OWCP medical adviser noted no connection between appellant's hip surgeries and his federal employment.

OWCP referred appellant to Dr. Weston for a second opinion. Dr. Weston opined that appellant's bilateral hip osteoarthritis was not related to his employment. He observed that arthritis was associated with age and race and not increased activities. Dr. Weston opined that there was nothing in appellant's case that would lead him to believe that appellant's hip conditions were not generic osteoarthritis which was likely an inborn cartilage resilience problem as evinced by his family history of hip arthritis in his mother. He also noted that appellant was at an average age for the appearance of symptoms. Dr. Weston concluded that appellant's right hip surgery was not covered under workers' compensation, and that he did not believe that surgery to his left side should be covered.

The Board finds that appellant did not establish that surgery to his left hip was necessitated as a result of his accepted employment-related condition of temporary aggravation of preexisting primary localized osteoarthritis of the bilateral hips. Appellant's claim was only accepted for this condition. The weight of the medical evidence, as represented by Dr. Weston, established that appellant's progressive arthritis was unrelated to appellant's accepted employment injury and that the bilateral hip surgeries were not employment related. Accordingly, appellant has not met his burden of proof.

⁶ *K.H.*, Docket No. 15-148 (issued February 24, 2015); *see also M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

⁷ *See R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

LEGAL PRECEDENT -- ISSUE 2

Under FECA the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as the term is used in FECA.⁹ The test of disability under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he was doing when injured.¹⁰ Whether a particular injury causes an employee to be disabled for work and the duration of the disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates for disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹² Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established disability from June 26 to September 4, 2012 and April 4 to May 30, 2014 causally related to the accepted condition of temporary aggravation of localized bilateral osteoarthritis of appellant's hips. The evidence indicates that appellant may have experienced some periods of disability during these time periods that were related to his bilateral hip replacement surgeries, however, the surgeries themselves were related to a condition which was never accepted as employment related.

The Board has taken the additional steps of reviewing the medical record. The evidence on file is not sufficient to establish a causal relationship between the surgeries and appellant's employment. Appellant claimed a period of disability from June 26 to September 4, 2012 related to his right hip replacement surgery of June 26, 2012. However, Dr. Van Horne, who performed the June 26, 2012 right hip replacement, did not address the cause of appellant's joint disease and resulting surgery. Dr. Dowd also did not discuss the cause of appellant's total arthroplasty in

⁸ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁹ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

¹⁰ *V.C.*, Docket No. 14-1252 (issued March 11, 2015); *Corlisia Sims*, 46 ECAB 963 (1995).

¹¹ *Tammy L. Medley*, 55 ECAB 182 (2003).

¹² *G.T.*, 59 ECAB 447 (2008); see also *L.S.*, Docket No. 14-1888 (issued February 10, 2015).

¹³ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

June 2012, or the cause of his bilateral hip pain and arthritis. OWCP medical adviser noted no connection between appellant's hip surgeries and his federal employment. Dr. Ermshar did discuss appellant's employment duties of walking 10 hours a day, and carrying 50-pound bags. He opined that appellant's right and left hip osteoarthritis was directly related to his employment. However, Dr. Ermshar did not provide any rationale to support his claim. Further, he did not note the impact of a family history of early osteoarthritis, appellant's age or other contributors to appellant's hip condition. It is well established that medical conclusions unsupported by rationale are of diminished value.¹⁴

The record also contains reports by Mr. Swartz, a physician assistant, and several nurse practitioners and physical therapists. However, physician assistants, nurse practitioners, and physical therapists are not considered physicians as defined under FECA.¹⁵ Therefore, this evidence is insufficient to establish that appellant was disabled from June 26 to September 4, 2012.

Appellant's claim for disability for the period April 4 to May 30, 2014 related to his federal employment. As discussed *supra*, Dr. Ermshar's opinion that appellant's osteoarthritis in his hips was causally related to his federal employment is not supported by a rationalized medical opinion. Dr. Weston opined that, although he did recommend that appellant have a left hip replacement, the proximate cause of appellant's hip degenerative joint disease was a genetic cartilage resilience problem. Accordingly, appellant has not established that he was disabled from April 4 to May 30, 2014 causally related to his federal employment.

No physician provided a well-rationalized medical opinion linking appellant's disability during the aforementioned time periods to his federal employment. An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that the condition was caused by his employment is sufficient to establish causal relationship.¹⁶

The Board finds that appellant has not submitted sufficient medical evidence to establish his claim. The medical evidence of record does not establish that the claimed disability from June 26 to September 4, 2012 and April 4 to May 30, 2014 was related to his accepted employment injury.¹⁷ As noted, causal relationship is a medical question that must be established by a probative medical opinion from a physician.¹⁸ The physician must accurately describe appellant's work duties and medically explain the pathophysiological process by which

¹⁴ *Jacqueline L. Oliver*, 48 ECAB 232 (1996).

¹⁵ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁶ *D.I.*, 59 ECAB 158 (2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

¹⁷ *M.M.*, Docket No. 07-1986 (issued February 4, 2008).

¹⁸ *W.P.*, Docket No. 14-1076 (issued September 18, 2014).

this incident would have caused or aggravated his condition.¹⁹ Because appellant has not provided such medical opinion evidence in this case, he has failed to meet his burden of proof.

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 OWCP properly denied medical expenses associated with appellant's claim for left hip arthroplasty. The Board further finds that appellant did not meet his burden of proof to establish total disability for the periods June 26 to September 4, 2012 and April 4 to May 30, 2014 due to his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ *Solomon Polen*, 51 ECAB 341 (2000) (rationalized medical evidence must relate specific employment factors identified by the claimant to the claimant's condition, with stated reasons by a physician). *See also S.T.*, Docket No. 11-237 (issued September 9, 2011).