

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY BESEMER and U.S. POSTAL SERVICE,  
POST OFFICE, Hicksville, NY

*Docket No. 98-927; Submitted on the Record;  
Issued July 3, 2000*

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DECISION and ORDER

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

The issue is whether appellant has established that he developed a hip or back condition as a consequential injury related to his accepted June 3, 1986 right knee employment injury.

On June 3, 1986 appellant, then a 34-year-old distribution clerk injured his right knee while assisting two clerks pushing an automatic lift. The Office of Workers' Compensation Programs accepted the claim for contusion of the right knee, sprain right knee, synovitis and internal derangement of right knee and authorized arthroscopy right knee with arthroplasty.<sup>1</sup> Appellant was placed on the periodic rolls for temporary total disability on May 22, 1987. Subsequently, the Office expanded the claim to accept a consequential injury of a left knee sprain.<sup>2</sup> He returned to light-duty work on May 2, 1994.

In a report dated January 20, 1991, Dr. Ann M. Collins<sup>3</sup> diagnosed right knee, leg and back pain which she opined was due to a vertebral subluxation. She opined that appellant's

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<sup>1</sup> The Board notes that appellant's history of right knee problems began in 1975 when appellant had a right knee meniscectomy following an injury in 1974, when he was kicked in the right knee during a bar fight, which predated the right knee problems he had in his civilian and military federal employment. The record also contains evidence that appellant reinjured his knee in 1977 while participating in physical fitness activities in the navy and was given a medical discharge. On July 23, 1992 the Veterans' Administration accepted that appellant's right knee problem was service related.

<sup>2</sup> The Board notes that appellant is also receiving benefits from the Veterans' Administration for his knee condition and his lumbosacral syndrome with right hip pain. In a letter dated January 23, 1997, the Veterans' Administration denied appellant's claim for nervous condition due to his "service-connected disability of bilateral knee condition and back pain syndrome with right hip pain." The record indicates appellant first injured his right knee in 1975, that he had a medial meniscectomy and ligament repair in 1976. After enlisting in the Navy in 1977, he was discharged that same year due to his right knee condition. The Veterans' Administration accepted that appellant's military duties aggravated his knee condition. Appellant also filed claims for injury to his right knee on May 13, 1980 and February 3, 1981.

<sup>3</sup> An attending chiropractor.

“uneven gait” added physical stress which created his subluxation which she found to be at the L3-S1 level.

Dr. Collins, in a November 15, 1991 report, noted that appellant had a right knee injury which caused him to favor his left knee, put a strain on his spine which caused a subluxation.

In a March 5, 1993 memorandum, the Office noted that appellant discussed his belief that he had sustained a consequential injury to his back and left leg due to his accepted right knee injury. The Office also noted that the record contained no evidence to support this allegation, but decided to develop this issue and requested appellant to submit additional medical evidence to support his allegation.

On January 24, 1996 appellant filed a traumatic injury claim alleging that on January 11, 1995 he sustained an injury to his right knee during a fitness-for-duty examination. He stopped work on January 11, 1995 and returned to work on February 15, 1995. The Office accepted this claim for a right knee strain.

In a July 24, 1996 report, Dr. L. Mermelstein<sup>4</sup> noted that appellant had been treated for back and knee problems under the medical history portion of the report. Dr. Herman noted subjective complaints of low back pain. Under objective findings, he noted “tenderness over the right lumbosacral paraspinal musculature with a possible trigger point in that area. There was no tenderness over the right hip. No swelling noted of the right hip.” Dr. Mermelstein diagnosed, “Lumbosacral pain syndrome on the right with a suggestion of a trigger point” and opined that appellant’s myofascial pain syndrome and low back pain “could be precipitated” by appellant’s abnormal gait which “could be associated with” appellant’s knee condition.

In a memorandum dated September 3, 1996, the Office noted that appellant had indicated that he wanted his claim expanded to include his back and hip problem and that a medical report from the Veterans’ Administration had been received to support appellant’s claim.

In a September 6, 1996 report, Dr. Robert S. Goodman<sup>5</sup> noted that he had previously examined appellant on June 24, 1993 and had diagnosed status post-right knee surgery in that report. He, based upon a physical examination and review of the medical records and statement of accepted facts, opined that appellant was not totally disabled, but must work in a sitting position and indicated that he had a permanent impairment rating of 42 percent. In his summary of the medical evidence sent for his review, the July 24, 1996 report by Dr. Mermelstein was the only one which mentioned appellant’s low back pain.

In a report dated December 5, 1996, Dr. Arnold M. Illman<sup>6</sup> opined that appellant’s right knee impairment was unchanged from 1987 when he saw him and indicated that he had a 40

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<sup>4</sup> A Board-certified orthopedic surgeon employed by the Department of Veterans’ Affairs. The report noted that Dr. Mermelstein had examined appellant with Dr. J.R. Herman approving the report.

<sup>5</sup> A second opinion Board-certified orthopedic surgeon.

<sup>6</sup> A second opinion Board-certified orthopedic surgeon.

percent impairment. Next, he concluded that there was “no evidence of disability of his left knee and no evidence of disability of his lumbosacral spine or his hip.”

In a decision dated December 17, 1996, the Office denied appellant’s claim and found that the evidence of record failed to support that appellant had a permanent impairment of his left knee and right hip or that his lumbosacral and right hip conditions were due to his accepted June 3, 1986 employment injury. The Office also found that appellant was not entitled to an increase in his impairment for his right knee.

Appellant requested an oral hearing by letter dated December 24, 1996 and a hearing was held on May 15, 1997.

In a May 14, 1997 report, Dr. William J. Kowalski, a chiropractor, diagnosed low back and right hip pain which he attributed to appellant’s knee injury. He noted that he had been treating appellant since 1987 for his lumbosacral pain which he opined was due to his knee injuries. Dr. Kowalski reported reviewing x-rays and also noted rotation subluxations at L4-5 and lateral flexion subluxations at L4, Sacrum. In concluding, he opined that appellant’s low back and right hip pain were related to his accepted June 3, 1986 knee injury.

By decision dated August 7, 1997, the hearing representative set aside the December 17, 1996 decision and remanded the case for referral for a second opinion concerning appellant’s additional schedule award for his right knee, whether appellant has any impairment in his left knee due to his accepted employment injury and to determine whether appellant had developed any impairment to his hip or back due to his accepted employment injury. The hearing representative noted that appellant’s nervous condition should be pursued separately under an occupational injury claim.<sup>7</sup>

By letter dated December 1, 1997, the Office referred appellant, together with a statement of accepted facts, medical records and list of questions to be answered, to Dr. Anthony G. Puglisi,<sup>8</sup> for a second opinion.

In a report dated December 19, 1997, Dr. Puglisi, based upon a physical examination, statement of accepted facts and review of the medical record, opined that appellant’s right hip and lumbosacral spine problems were unrelated to his accepted June 3, 1986 employment injury. In support of his opinion, Dr. Puglisi noted “that over a 10-year period he had no complaints of any back nor hip problems” which excluded these complaints from being causally related to his accepted June 3, 1986 employment injury.

By decision dated January 21, 1998, the Office found that appellant’s lumbosacral and hip conditions were not a consequential injury related to his June 3, 1986 employment injury.<sup>9</sup>

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<sup>7</sup> Subsequent to the hearing representative’s decision, appellant filed an occupational disease claim for his nervous condition pursuant to the hearing representative’s recommendation.

<sup>8</sup> A second opinion Board-certified orthopedic surgeon.

<sup>9</sup> By letter dated January 26, 1998, appellant requested an oral hearing on the denial of his claim on

The Board finds that appellant has not established that he developed a hip or back condition as a consequential injury related to his accepted June 3, 1986 right knee employment injury.

The basic rule respecting consequential injuries is 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 similarly arises out of the employment unless it is the result of an independent intervening cause. However, an employee who asserts that a nonemployment-related injury was a consequence of a prior employment-related injury has the burden of proof to establish that such was the fact.<sup>10</sup> Appellant did not meet this burden in this case.

In the case of *John R. Knox*,<sup>11</sup> regarding consequential injury, the Board stated:

“It is an accepted principal of workers’ compensation law, and the Board has so recognized, 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 Professor Larson in his treatise: ‘[O]nce the work-connected character of any injury, such as a back 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.... [S]o 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. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant’s knowledge of his condition.’”<sup>12</sup> (citations omitted)

In the present case, however, appellant has not met his burden of proof to demonstrate that the right knee employment injury progressed to cause a hip or back condition. In support of his claim, he submitted a May 14, 1997 report from Dr. Kowalski, a chiropractor and a July 24, 1996 report by Dr. Mermelstein. Dr. Kowalski attributed appellant’s low back and right hip problem to his accepted June 3, 1986 employment injury without providing any rationale explaining how appellant’s low back and right hip pain arose from or was due to his accepted knee injury in attributing this condition to appellant’s accepted employment injury. A medical conclusion without supporting rationale is of little probative value.<sup>13</sup> Furthermore, Dr. Kowalski

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January 21, 1998. The Board notes that appellant filed his appeal with the Board on February 3, 1998 of the January 21, 1998 decision and that the Office had not issued a decision on appellant’s request for hearing at the time of his appeal to the Board.

<sup>10</sup> See *Margarette B. Rogler*, 43 ECAB 1034 (1992).

<sup>11</sup> 42 ECAB 193 (1990).

<sup>12</sup> *Id.*

<sup>13</sup> *Jean Culliton*, 47 ECAB 728 (1996).

does not appear to have knowledge of appellant's right knee injury history. The Board has held that medical opinions premised on an inadequate factual or medical history are of diminished probative medical value.<sup>14</sup> Moreover, the opinion of Dr. Kowalski, as a chiropractor, is only afforded probative value in regard to the spine and his opinion is of no probative value to the extent that he evaluated or diagnosed disorders of the extremities.<sup>15</sup>

Dr. Collins' January 20 and November 15, 1991 reports are also insufficient to meet appellant's burden. In her January 20, 1991 report, she diagnosed right knee, leg and back pain due to a subluxation. Dr. Collins, in her November 15, 1991 report, attributed appellant's subluxation to his right knee injury which caused him to favor his left leg which in turn put a strain on his spine. She attributed appellant's subluxation to appellant's "uneven gait" caused by his right knee disability which created additional physical stress which created the subluxation. As noted with Dr. Kowalski, Dr. Collins, as a chiropractor, is only afforded probative medical value in regard to the spine and her opinion is of no probative value to the extent that she evaluated or diagnosed disorders of the extremities.<sup>16</sup>

Similarly, Dr. Mermelstein's report is also insufficient to meet appellant's burden. In his July 24, 1996 report, he opined that appellant's low back "could be precipitated" by appellant's abnormal gait and his knee condition. This opinion is speculative and, therefore, it is of diminished probative value and is insufficient to support appellant's claim of a consequential injury.<sup>17</sup>

Consequently, none of the reports by Drs. Collins, Mermelstein or Kowalski are sufficient to establish appellant's claim as the opinions either lack medical rationale or are speculative, as well as fail to take into account appellant's preexisting conditions. On the other hand, Dr. Puglisi examined appellant and concluded that appellant's right hip and lumbosacral spine problems were unrelated to appellant's accepted June 3, 1986 employment injury.<sup>18</sup> Furthermore, the opinion of Dr. Puglisi, as a second opinion physician, is supported by the second opinion reports of Dr. Illman, who opined appellant had no evidence of any lumbosacral spine or hip problems at that time and Dr. Goodman, who noted that Dr. Mermelstein's July 24, 1996 report was the only medical report which mentioned appellant's low back pain.

As appellant submitted no other medical evidence supporting that his hip or back condition was a direct consequence of his June 3, 1986 right knee injury, he has failed to meet

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<sup>14</sup> See *Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

<sup>15</sup> See *George E. Williams*, 44 ECAB 530 (1993).

<sup>16</sup> *Id.*

<sup>17</sup> *Philip J. Deroo*, 39 ECAB 1294 (1988).

<sup>18</sup> The Office's January 21, 1998 decision inadvertently indicated that Dr. Puglisi conducted an impartial medical examination. However, the context of the decision and the referral letters to Dr. Puglisi do not indicate that the Office referred appellant to Dr. Puglisi to resolve a medical conflict or that the Office gave his report special weight; see 5 U.S.C. § 8123(a).

his burden of proof to establish his consequential injury claim. Therefore, the Office correctly found that consequential injury to his right hip and back had not been established.

The decision of the Office of Workers' Compensation Programs dated January 21, 1998 is affirmed.

Dated, Washington, D.C.  
July 3, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member