United States Department of Labor
Employees' Compensation Appeals Board

WAYNE H. BREHMER, Appellant	)	
and	)	**Docket No. 05-1434**
	)	**Issued: December 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 23, 2005 appellant filed a timely appeal of a June 17, 2005 decision of an Office of Workers' Compensation Programs' hearing representative, affirming a June 19, 2003 decision denying appellant's claim for a knee condition. Pursuant to 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 has established a knee condition causally related to compensable work factors; and (2) whether the Office hearing representative properly denied appellant's request for a subpoena of the impartial medical specialist.

FACTUAL HISTORY

On September 22, 2000 appellant, then a 52-year-old-letter carrier, filed an occupational disease claim for compensation (Form CA-2) alleging that he had left knee replacement surgery causally related to his federal employment. Appellant underwent a left total knee arthroplasty on July 18, 2000. He returned to a light-duty position on November 8, 2000. In an undated

statement, appellant indicated that he began having knee problems, especially with the left knee, in 1986 and that his work as a letter carrier for 27 years had aggravated his condition. Appellant noted that his job required standing, twisting, bending and walking.

An attending family practitioner, Dr. Subbarao Gorti, noted in a September 8, 2000 report that May 20, 1986 x-rays had revealed significant osteoarthritis in the left knee, and April 7, 2000 x-rays showed extensive degenerative joint disease. In a September 11, 2000 report, Dr. Thomas Beck, Jr., an osteopath, opined that appellant's job as a letter carrier "most probably added to the advanced progression of his degenerative joint disease requiring knee replacement." Dr. Gorti stated in a November 28, 2000 report that appellant's "current employment as a letter carrier has substantially contributed to his present disability." Dr. Gorti noted the stress and strain from walking long distances and climbing up and down stairs.

The Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Steven Valentino, an osteopath. In a report dated July 25, 2001, he provided a history and results on physical examination. Dr. Valentino opined that appellant's "left knee symptoms and need for surgery were related to underlying age-related degenerative changes exacerbated by his history of being overweight. I find no evidence to substantiate any causal connection between his left or right knee complaints and his employment or any work injury."

The Office determined that a conflict in the medical evidence was created and referred appellant, a statement of accepted facts and medical records, to Dr. Joseph Jelen, Jr. a Board-certified orthopedic surgeon. In a report dated November 11, 2001, Dr. Jelen concluded that there was no specific link between appellant's employment and his need for knee replacement. By decision dated December 28, 2001, the Office denied appellant's claim for compensation on the grounds that the medical evidence did not establish causal relationship between his knee condition and federal employment.

In a decision dated April 25, 2002, an Office hearing representative remanded the case for further development. The hearing representative stated that the issue was whether the job duties appellant had performed for 27 years caused or aggravated the degenerative knee arthritis, and the statement of accepted facts did not provide any description of the job duties. On remand, the Office prepared a new statement of accepted facts and Dr. Jelen submitted a July 11, 2002 report. Dr. Jelen stated that appellant's work activities did not "significantly aggravate" his condition. By decision dated August 6, 2002, the Office again denied appellant's claim.

An Office hearing representative remanded the case for additional development in a decision dated February 19, 2003. The hearing representative noted that Dr. Jelen had referred to the work activities as not "significantly" aggravating the condition, without clearly indicating whether the degenerative condition had in any way been affected by factors of federal employment. The Office was directed to refer the case to another impartial medical specialist.

The Office referred appellant, a statement of accepted facts and medical records, to Dr. John Williams, Sr., a Board-certified orthopedic surgeon. The questions posed to Dr. Williams included a question as to whether there was an aggravation, and if so, whether it was temporary or permanent. In a letter dated April 15, 2003, the Office requested that Dr. Williams explain whether appellant's left knee condition had been affected in any way by

factors of his federal employment. In a report dated April 15, 2003, Dr. Williams provided a history and results on examination. He stated that appellant had advanced degenerative joint disease and his job did not cause the degenerative changes seen in 1986 or 2000. In response to the question, as to whether federal employment had affected the knee, Dr. Williams stated that every activity of daily living, such as combing hair, eating breakfast and going to work, affects us in some way. Dr. Williams further stated:

> "Everything has an affect upon us but they are not the cause of us growing old and becoming degenerative in a microscopic change. It is not a macroscopic but a microscopic change that we go through on a day-to-day basis. So, I think for me to say this job has no effect would be scientifically incorrect. But, in my opinion, did it have a causal effect to the extent that it necessitated this patient to have a total knee arthroplasty, then the answer is no."

Dr. Williams concluded that appellant, at a young age, had advanced degenerative joint disease involving his major joints and spine, and "none of this was factored in by this patient's employment activities. This patient unfortunately had some other risk factors and I suspect them to be genetic predisposition."

By decision dated June 19, 2003, the Office denied appellant's claim for compensation on the grounds that appellant's condition was a genetic process not affected by employment duties.

In a letter dated June 27, 2003, appellant requested an oral hearing before an Office hearing representative and requested a subpoena of Dr. Williams. By letter dated January 21, 2005, the hearing representative denied the subpoena request. Appellant then requested a review of the written record.

By decision dated June 17, 2005, the hearing representative affirmed the June 19, 2003 decision. The hearing representative stated "The claimant's duties as a [l]etter [c]arrier may have temporarily aggravated his symptoms, but they did not alter his underlying condition, and did not cause the need for a total left knee arthroplasty."[1]

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as

[1] The hearing representative indicated the appeal rights to the decision also attached to the January 21, 2005 denial of the subpoena request.

[2] 5 U.S.C. §§ 8101-8193.

alleged and that any specific condition or disability claimed is causally related to the employment injury.[3]

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[4]

With respect to an employment-related aggravation, an aggravation may be temporary or permanent. It is not necessary that a work factor "materially" contribute to a disabling condition; an employment-related aggravation is compensable "regardless of the precise quantum of such aggravation directly attributable to work."[5]

ANALYSIS -- ISSUE 1

The Office initially attempted to resolve the conflict in the medical evidence under 5 U.S.C. § 8123(a)[6] by referring appellant to Dr. Jelen. As the hearing representative noted in his February 19, 2003 decision, Dr. Jelen used the term "significantly" in an opinion regarding an employment-related aggravation, which is inappropriate. The degree of aggravation is not the proper consideration in determining compensation under the Act.

The second impartial specialist, Dr. Williams, also appeared to be evaluating the degree of contribution in providing an opinion on causal relationship. Dr. Williams indicated that there was some affect on the condition from employment factors, but he found that it was not distinguishable from everyday activities and it was not to the extent that it "necessitated" the surgery. Neither of these are dispositive on the compensation issue presented. The question is whether there was any aggravation of the underlying degenerative condition with some contribution by work factors. If so, was the aggravation temporary or permanent, and if temporary, what was the duration of the temporary aggravation.

Dr. Williams does not clearly resolve these issues. The hearing representative in the June 17, 2005 decision acknowledged that, based on Dr. Williams's report, appellant's job duties "may have temporarily aggravated his symptoms." If there was a temporary employment-related aggravation, then the medical evidence must establish the extent and duration of the

[3] 20 C.F.R. § 10.115(e), (f) (2005); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence. *See Robert G. Morris*, 48 ECAB 238 (1996).

[4] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[5] *Arnold Gustafson*, 41 ECAB 131, 134 (1989), quoting *Henry Klaus*, 9 ECAB 333 (1957).

[6] This section provides that, if there is a disagreement between appellant's physician and an Office physician, a third physician is appointed to make an examination.

aggravation.[7] The case will be remanded to the Office to secure medical evidence that properly resolves the outstanding issues in the case. After such further development as the Office deems necessary, it should issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100.22 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. The Office regulation states that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[8]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained."[9] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[10]

ANALYSIS -- ISSUE 2

In the present case, appellant's representative requested that a subpoena be issued to Dr. Williams, as his report was contradictory and questions must be answered by an appearance at an oral hearing. He did not clearly explain why a subpoena was the best method to obtain such evidence. The hearing representative found that there was no evidence submitted as to why Dr. Williams should be present at an oral hearing. As noted above, the Board reviews the hearing representative decision to determine if there was an abuse of discretion. The record does not establish an abuse of discretion in this case.

CONCLUSION

The Board finds that the impartial medical specialist, Dr. Williams, did not resolve all the issues presented and the case requires further development. The Board further finds no abuse of discretion in the denial of a subpoena request.

[7] *See Nathan L. Harrell*, 41 ECAB 402 (1190) (impartial specialist's report on the duration of a temporary aggravation was unrationalized and the case required further development).

[8] 20 C.F.R. § 10.619.

[9] *Id.*

[10] *Martha A. McConnell*, 50 ECAB 128 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 21, 2005 regarding the subpoena request is affirmed. The June 17, 2005 decision is set aside and the case remanded to the Office for further development consistent with this decision of the Board.

Issued: December 12, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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