

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

<p>W.H., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Bellmawr, NJ, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 07-695 Issued: June 18, 2007</p>
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Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 17, 2007 appellant, through his attorney, filed a timely appeal from a July 21, 2006 merit decision of a hearing representative of the Office of Workers' Compensation Programs affirming a finding that he did not establish a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained a recurrence of disability on or after December 30, 1998 causally related to his February 19, 1995 employment injury.

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board set aside an August 12, 2002 decision finding that appellant had not sustained a recurrence of disability on or after December 30, 1998.¹ The Board determined that a conflict in medical opinion existed on

¹ *William A. Hazelton*, Docket No. 03-406 (issued April 3, 2003).

the issue of whether his 1999 right knee condition was caused or aggravated by his February 19, 1995 employment injury. On appeal for the second time, the Board found that the opinion of Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, selected to resolve the conflict in medical opinion established that appellant's March 5, 1999 right knee surgery was not related to his February 19, 1995 accepted employment injury of right knee strain.² The Board further found, however, that Dr. Askin's opinion was insufficient to resolve the conflict regarding whether his recurrence of disability on or after December 30, 1998 was due to his February 19, 1995 employment injury. The Board determined that Dr. Askin failed to definitively address the issue of the alleged December 30, 1998 recurrence of disability. The Board remanded the case for the Office to obtain clarification from Dr. Askin. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On remand, the Office requested that Dr. Askin address whether appellant sustained a recurrence of disability on December 30, 1998 due to his February 19, 1995 employment injury. In a report dated December 14, 2005, Dr. Askin noted that appellant underwent authorized surgery on July 25, 1995 for internal derangement of the right knee and a repair of a torn lateral meniscus. He found that the diagnosis from the July 25, 1995 surgery of internal derangement more accurately reflected the employment-related condition than the accepted condition of right knee strain. Appellant described improvement after the July 25, 1995 surgery followed by a slow increase in right knee symptoms. Dr. Askin discussed his findings of restricted hip movement on prior examination which he opined could cause extra stress on the knee. He stated, "If the accepted injury was a right knee strain, the later worsening was not a recurrence of his work injury. Again, a strain is a partial tear of a muscle and there is nothing described in these records that corresponds to recurrence of such injury." Dr. Askin further related:

"As noted above, [appellant] does have a physical reason why his right knee is troubled due to limitation of hip motion as an intervening cause. Furthermore, there was no surgical or even [magnetic resonance imaging study] (MRI) [scan] finding that described anything medically related to either the knee stain (accepted injury) or the surgical findings reported at the first surgery. There was no effusion found suggests that the knee itself was not the site of [appellant's] difficulty. From a purely medical perspective the second surgery was a medically irrelevant procedure, not only not related to the work injury but also apparently not related to the source of his complaint either.

"The bottom line is that the allegation of disability beginning on December 30, 1998 was not related to the accepted February 19, 1995 work injury and the work stoppage was not a result of a spontaneous return of the symptoms of the previous injury without intervening cause."

By decision dated January 6, 2006, the Office found that appellant did not establish that he sustained a recurrence of disability on or after December 30, 1998 causally related to his February 19, 1995 employment injury. The Office noted that appellant did not claim any dates

² *William A. Hazelton*, Docket No. 05-349 (issued August 19, 2005).

of disability from employment until March 5, 1999, the date of his second surgery found to be unrelated to his employment injury.

Appellant, through his attorney, requested an oral hearing. At the hearing, held on May 26, 2006 counsel argued that Dr. Askin's report was speculative in nature because there was no indication that appellant had a hip problem in 1998 which caused his condition to worsen.

In a decision dated July 21, 2006, the Office hearing representative affirmed the January 6, 2006 decision.

LEGAL PRECEDENT

A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁵

Section 8123(a) 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.⁶ 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.⁷ When there exist 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 upon a proper factual background, must be given special weight.⁸

³ 20 C.F.R. § 10.5(x).

⁴ *Carmen Gould*, 50 ECAB 504 (1999).

⁵ *Mary A. Ceglia*, 55 ECAB 626 (2004).

⁶ 5 U.S.C. § 8123(a).

⁷ 20 C.F.R. § 10.321.

⁸ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS

The Office accepted that appellant sustained right knee strain due to a February 19, 1995 employment injury. He underwent arthroscopic surgery on July 25, 1995 and resumed his regular employment on November 1, 1995. On February 11, 1999 appellant filed a notice of recurrence of disability. He underwent a chondroplasty of an osteochondral lesion on March 5, 1999.

By decision dated April 3, 2003, the Board determined that a conflict existed regarding whether appellant's right knee condition in 1999 was causally related to his accepted employment injury.⁹ The Office referred appellant to Dr. Askin for resolution of the conflict. In a decision dated August 19, 2005, the Board concluded that Dr. Askin's opinion established that the March 5, 1999 right knee surgery was unrelated to the accepted employment injury.¹⁰ The Board found, however, that Dr. Askin did not adequately address the issue of whether appellant's disability for work on or after December 30, 1998 resulted from his February 19, 1995 employment injury. The Board remanded the case for the Office to seek clarification from Dr. Askin regarding the cause of appellant's disability on or after December 30, 1998.

Where there exist opposing medical reports 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 upon a proper factual background, must be given special weight.¹¹ In a report dated December 14, 2005, Dr. Askin characterized the accepted employment injury as internal derangement of the right knee in accordance with the condition diagnosed at the time of the July 25, 1995 authorized surgery. He discussed appellant's complaints of increased right knee discomfort over time. Dr. Askin noted that appellant had reduced range of motion of the hip which could cause stress on the knee. He determined that the second surgery on March 5, 1999 did not reveal anything related to either the accepted condition of right knee strain or to the findings from the initial surgery. Dr. Askin also asserted that the lack of effusion "suggests that the knee itself was not the site of [appellant's] difficulty." He concluded that appellant did not sustain a recurrence of disability beginning December 30, 1998 due to his February 19, 1995 work injury.

The Board finds that the Office properly relied upon the opinion of Dr. Askin in finding that appellant did not establish a recurrence of disability on or after December 30, 1998 due to his February 19, 1995 employment injury. Dr. Askin based his opinion on a proper factual and medical history and accurately summarized the medical evidence. He provided rationale for his conclusion by explaining that the 1999 right knee surgery and the diagnostic studies did not reveal a problem related to either the prior accepted condition or the 1995 authorized surgery. The Board has reviewed the opinion of Dr. Askin and finds that it has reliability, probative value and convincing quality with respect to the conclusions reached. Thus, his opinion is entitled to

⁹ *William A. Hazelton*, Docket No. 03-206 (issued April 3, 2003).

¹⁰ *William A. Hazelton*, Docket No. 05-349 (issued August 19, 2005).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

the special weight accorded an impartial medical examiner and establishes that appellant did not sustain an employment-related recurrence of disability.¹²

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability on or after December 30, 1998 due to his February 19, 1995 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 21, 2006 is affirmed.

Issued: June 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹² On appeal, appellant's attorney submitted a brief and raised arguments relevant to the prior appeal.