

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

P.M., Appellant)
and) Docket No. 08-574
U.S. POSTAL SERVICE, POST OFFICE,) Issued: August 5, 2008
Knoxville, TN, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On December 19, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 29, 2007 merit decision denying appellant's request for authorization for surgery. 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 the Office abused its discretion in refusing to authorize appellant's request for surgery.

FACTUAL HISTORY

On May 24, 2002 appellant, then a 52-year-old rural letter carrier, filed an occupational disease claim alleging that he sustained a knee injury as a result of performing his employment duties. His claim was accepted on January 29, 2003 for aggravation of osteoarthritis in both knees.

The Office received visit notes from Dr. E. Michael Holt, Board-certified in orthopedic surgery, and Dr. Scott Smith, Board-certified in orthopedic surgery, dated from September 11, 2000 to May 14, 2003. In the March 5, 2003 visit, Dr. Holt recorded that he discussed total knee arthroplasty of both knees with appellant. On June 9, 2003 appellant's physician requested authorization for bilateral knee replacements.

The Office consulted with its medical adviser in order to ascertain whether the proposed surgery was both medically necessary and causally related to appellant's accepted employment injury. In a June 13, 2003 note, the medical adviser opined that the surgery request should be denied on the grounds that the claimant's physician stated that appellant had denied any injury, and that appellant's physician had opined that the aggravation had resolved. The medical adviser also offered his own medical opinion that appellant's arthritis was unrelated to his work, but rather was the result of the natural progression of the disease.

On June 17, 2003 the Office determined that a second opinion evaluation was necessary to determine whether the bilateral total knee replacement was related to his accepted bilateral aggravation of osteoarthritis.

On July 28, 2003 appellant was evaluated by Dr. Thomas Koenig, a Board-certified orthopedic surgeon. The July 28, 2003 work capacity evaluation restricted appellant to six hours of work per day. In his July 28, 2003 report, Dr. Koenig opined that appellant's bilateral total knee replacement is no more necessary due to the incident of February 1, 2001, the "date" of the injury used by the Office, than to any other day of appellant's adult life. He continued "It is much more likely that appellant's bilateral total knee replacements are not due to one specific injury but due to chronic wear and tear which would have occurred just as likely in the workplace as at home." Dr. Koenig concurred with Dr. Holt's September 2, 2002 statement that "I do feel his job situation did irritate his knee intermittently, but have told him that I cannot say that his job accelerated his arthritic process or caused his arthritic process more than any activities of daily living would have." He concluded that it was his opinion that appellant would have required bilateral total knee replacement regardless of whether or not he was injured and that the work-related injury was not likely to have significantly altered appellant's preexisting course.

In an August 12, 2003 decision, the Office denied appellant's request for bilateral total knee replacement based on Dr. Koenig's opinion that the requested surgery was not causally related to the accepted work injury.

On September 10, 2003 appellant requested an oral hearing. The hearing was held on March 23, 2004.

In a July 8, 2004 decision, the Branch of Hearings and Review found that Dr. Koenig's report was based upon an inaccurate statement of accepted facts which incorrectly indicated that the claimant had sustained a traumatic injury on February 2, 2001. It set aside the August 12, 2003 decision and remanded the case to the Office for a new examination.

On January 31, 2005 appellant was informed that a second opinion evaluation was scheduled for February 22, 2005 with Dr. Wayne L. McLemore, Board-certified in orthopedic

surgery. The questions for the second opinion examiner inquired as to whether the bilateral total knee replacement was medically necessary due to appellant's work injury and whether it was medically probable that the accepted aggravation of osteoarthritis had ceased? The second opinion examiner was also asked to address whether the accepted aggravation was a temporary or permanent aggravation, if it had not ceased. The definitions of occupational disease and temporary and permanent aggravation were included. An addendum statement of accepted facts with the physical requirements of appellant's job was also provided.

In an April 13, 2005 report, Dr. McLemore opined that the total knee arthroplasties were not necessitated by appellant's job duties of braking, standing, pushing and walking. He opined that the knee replacements were necessary due to the pain from the osteoarthritis which was at the advanced and severely limiting level. Dr. McLemore opined that appellant's prior right knee surgery in 1973 and his obesity predisposed the knees to premature wear and advanced the osteoarthritis with more import than his job activities. He also stated that it was probable that the accepted aggravation had ceased and commented that a resurfaced joint no longer advances with osteoarthritis and that all weight-bearing physical activity, whether on the job or not, caused wear to progress the knee replacement components.

On June 17, 2005 the Office denied appellant's request for bilateral total knee arthroplasties based on Dr. McLemore's opinion that the surgery was not causally related to appellant's work injury.

In a November 2, 2005 decision, the Office denied appellant's claim for compensation for the period June 24, 2005 to present on the grounds that no medical evidence was received to support that appellant was disabled during the claimed time period.

On November 3, 2005 the Office issued a proposed termination of compensation and medical benefits based on the February 22, 2005 report from Dr. McLemore who found that the aggravation of osteoarthritis in both knees had resolved.

On January 15, 2006 appellant requested reconsideration of the June 17, 2005 decision. In support a November 30, 2005 report, Dr. John W. Ellis, Board-certified in family medicine, was submitted. In the report, he reviewed the case record and evaluated appellant. Dr. Ellis disagreed with Dr. McLemore's assessment noting that appellant had already undergone bilateral total knee arthroplasties¹ which was the only reason the joints had been resurfaced. He further opined that were it not for the knee replacements appellant would still have the osteoarthritic changes that were aggravated by his employment. Upon evaluation Dr. Ellis noted well-healed surgical scars from open procedures in both knees. He diagnosed aggravation of osteoarthritis, bilateral knees status post bilateral total knee arthroplasties and opined that appellant was temporarily totally disabled for four months. In conclusion Dr. Ellis found that, if appellant had not had knee replacements, he would still have ongoing arthritis changes and pain as a result of his work-related job duties aggravating the preexisting osteoarthritis.

On March 7, 2006 the Office informed appellant that a conflict in medical evidence existed and that a referee examination would be conducted on April 3, 2006 with Dr. William M.

¹ There is no operation report from appellant's surgery in the case record.

Hovis, Board-certified in orthopedic surgery. The appointment was later rescheduled for April 26, 2006. The Office identified the issue for the referee examiner of whether “appellant’s preexisting condition of osteoarthritis was accelerated by his work injury” and included two questions, whether the job duties accelerated his preexisting condition of bilateral osteoarthritis of the knees and whether the bilateral total knee replacements were medically necessary and related to his original work injury of February 1, 2001.

In his April 26, 2006 report, Dr. Hovis noted that appellant had bilateral total knee arthroplasty performed by Dr. Holt on August 15, 2003. He opined that appellant’s job did not materially contribute to, accelerate, or aggravate his osteoarthritic condition more than the ordinary activities of daily living would. In response to the question about bilateral knee replacements being medically necessary and related to the work injury Dr. Hovis responded that appellant denied any injury to either knee at work.

In a July 13, 2006 merit decision, the Office denied modification of the previous decision denial of appellant’s request for bilateral total knee replacement. It found that the weight of the medical evidence was with Dr. Hovis, as he was a specialist, had reviewed the medical records and had examined appellant.

On April 22, 2007 appellant, through his representative, requested reconsideration and argued that the surgeries were medically necessary as stated by Drs. Holt, McLemore and Ellis and that no true conflict among the medical evidence existed.

In a June 13, 2007 merit decision, the Office denied modification of the previous decisions.

On September 7, 2007 appellant, through his representative, requested reconsideration and argued that the Office’s phrasing of the issue and questions to the referee doctor, Dr. Hovis, was a form of doctor shopping.

In an October 29, 2007 decision, the Office denied modification of the denied authorization for bilateral knee replacements.

LEGAL PRECEDENT

Section 8103(a) of the Federal Employees’ Compensation Act provides for the furnishing of “services, appliances and supplies prescribed or recommended by a qualified physician” which the Office, under authority delegated by the Secretary, “considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.”² In interpreting section 8103(a), the Board has recognized that the Office has broad discretion in approving services provided under the Act to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.³ The

² 5 U.S.C. § 8103(a).

³ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

Office has administrative discretion in choosing the means to achieve this goal and the only limitation on the Office's authority is that of reasonableness.⁴

While the Office 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 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 is 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 the Office to authorize payment.⁷

The Act provides that, if there is a 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.⁸ 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 or consultant, 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 had no prior connection with the case.⁹

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.¹⁰

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.¹¹

⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts).

⁵ See *Dona M. Mahurin*, 54 ECAB 309 (2003); see also *Debra S. King*, 44 ECAB 203, 209 (1992).

⁶ See *Debra S. King*, *supra* note 5; *Bertha L. Arnold*, 38 ECAB 282 (1986).

⁷ See *Dona M. Mahurin*, *supra* note 5; see also *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

⁸ 5 U.S.C. §§ 8101-8193, 8123.

⁹ 20 C.F.R. § 10.321.

¹⁰ *Elaine Sneed*, 56 ECAB 373 (2005).

¹¹ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810(11)(c)(1)-(2) (April 1993).

ANALYSIS

The Board finds that the Office failed to undertake proper development of the medical evidence. The Office erred by not requesting that Dr. Hovis provide a supplemental report.

Dr. Hovis' report was not based on proper factual background. Appellant's claim was for occupational injury, not traumatic injury, therefore, the fact that appellant denied any specific traumatic injury is irrelevant. His claim was accepted for aggravation of osteoarthritis in both knees. The question at issue was whether the accepted condition necessitated surgery. Therefore the issue of whether appellant's work aggravated his preexisting condition is moot. The Office has already accepted bilateral aggravation of osteoarthritis. By attempting the reevaluation of the acceptance of the claim, the Office was actually attempting to rescind acceptance of the claim. The Office can rescind its acceptance or terminate appellant's claim but must do so through the proper procedures. The Office should have clarified to Dr. Hovis that the issue for determination was whether appellant's accepted condition, aggravation of osteoarthritis of both knees, contributed to the need for bilateral knee replacements.

On remand, the Office should further develop the medical evidence and obtain a supplemental report from Dr. Hovis to address the issue of whether appellant's accepted injury contributed to the need for surgery. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's request for surgery.

CONCLUSION

The Board finds that the Office did not properly develop the medical evidence and should be remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2007 decision of the Office of Workers' Compensation Programs is vacated and the case is remanded.

Issued: August 5, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board