United States Department of Labor
Employees' Compensation Appeals Board

J.D., Appellant	)	
and	)	**Docket No. 07-1871**
	)	**Issued: January 11, 2008**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Philadelphia, PA, Employer	)	

Appearances:
Thomas 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 July 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 23, 2007 denying authorization for left knee surgery and claim for wage-loss compensation commencing April 1, 2002. 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 the Office properly denied authorization for total left knee replacement surgery on April 1, 2002; and (2) whether appellant established his claim for disability commencing April 1, 2002.

FACTUAL HISTORY

Appellant, an Office claims examiner, filed a traumatic injury claim (Form CA-1), alleging that he sustained a left knee injury in the performance of duty on March 16, 1999 while

stepping onto a curb. The Office accepted the claim for aggravation of preexisting left knee degenerative joint disease. Appellant underwent left knee arthroscopic surgery on July 14, 1999.

On March 29, 2002 appellant filed a claim for compensation (Form CA-7) for the period commencing April 1, 2002. He also filed a recurrence of disability claim (Form CA-2a). Appellant indicated that he was scheduled for left knee surgery on April 1, 2002. By decision dated May 13, 2002, the Office denied the claim for compensation and authorization for surgery finding that there was no supporting medical evidence of record.

Appellant requested an oral hearing before an Office hearing representative and submitted additional evidence. In a report dated May 1, 2002, Dr. Craig Israelite, an orthopedic surgeon, indicated that he performed a left knee total replacement on April 1, 2002. He stated that the surgery was the result of appellant's original work injury based on his history. By report dated October 2, 2002, Dr. Israelite stated that there was no question appellant had preexisting degenerative arthritis, but he did believe that the March 1999 injury necessitated the July 1999 arthroscopic surgery and his knee replacement surgery was directly related to the injury, the arthroscopic surgery and further degeneration of the knee.

By decision dated July 1, 2005, an Office hearing representative set aside the May 13, 2002 decision. He remanded the case for further development and referral to a second opinion physician. It was noted that appellant had a prior claim for a left knee injury on November 3, 1987 and the claims should be administratively combined.

The Office prepared a statement of accepted facts and referred appellant to Dr. Robert Smith, an orthopedic surgeon. In a report dated November 8, 2005, Dr. Smith provided a history and results on examination. He opined that the total knee replacement surgery was the result of a natural progression of appellant's degenerative knee condition. Dr. Smith stated that, given the extent of appellant's arthritis extending back to the early 1990's, he would have had a total knee replacement regardless of whether he had the 1987 or 1999 minor work injuries.

In a decision dated December 1, 2005, the Office denied appellant's claim for compensation and authorization for surgery.

By decision dated March 20, 2006, an Office hearing representative remanded the case for a supplemental report from Dr. Smith. She stated Dr. Smith should discuss whether the accepted 1999 surgery caused a condition or the need for replacement surgery. Dr. Smith submitted an April 21, 2006 report stating that the knee replacement surgery was indicated for the knee arthritis, but there was no causal relationship between the accepted surgery of July 14, 1999 and the knee replacement surgery.[1]

Appellant submitted a February 11, 2006 report from Dr. Vincent DiStefano, an orthopedic surgeon. Dr. DiStefano indicated that he performed the July 14, 1999 arthroscopic surgery. He opined that the work injury aggravated a preexisting but quiescent degenerative arthritis and eventually forced appellant to undergo knee replacement surgery.

[1] Dr. Smith used the term "injury" but it appeared he was referring to the accepted July 14, 1999 surgery.

The Office determined that a conflict in the medical evidence existed and pursuant to 5 U.S.C. § 8123(a) appellant was referred to Dr. Noubar Didizian, a Board-certified orthopedic surgeon. In a report dated July 6, 2006, Dr. Didizian provided a history and results on examination. He reviewed the medical evidence and stated:

> "It is my medical opinion that the March 16, 1999 injury necessitated the arthroscopic surgery, which was accepted, as well as aggravation of the preexisting degenerative disease. The surgery, in my opinion, was beneficial and allowed [appellant] to go back to work. However, the natural progression of the degenerative disease, in my opinion, was the eventual cause of the total knee arthroplasty.
>
> "In other words, if [appellant] had not sustained any injury on March 16, 1999 and had not undergone the arthroscopic surgery, in my opinion, he would have necessitated a total knee replacement based on the end[-]stage tricompartmental degenerative disease which was diagnosed as far back as the [magnetic resonance imaging] [scan] of January 18, 1994 and April 26, 1999."

Dr. Didizian noted that the knee replacement surgery did not occur until 15 years after the original assessment in 1987, that appellant had degenerative disease and it would take that amount of time for the progression of the disease to necessitate total knee replacement. He concluded that the March 16, 1999 injury did not advance the timing of the knee replacement surgery and did not have anything to do with the 2002 knee replacement surgery.

By decision dated August 17, 2006, the Office denied appellant's claim for compensation and denied reimbursement for the April 1, 2002 surgery.

Appellant requested an oral hearing which was held on December 12, 2006. He submitted an August 7, 2006 report from Dr. Roy Lefkoe, an orthopedic surgeon, who stated that he had reviewed Dr. Didizian's report and disagreed with his conclusion. According to Dr. Lefkoe, if the March 16, 1999 injury was sufficiently severe to require surgery, then it was severe enough to aggravate the knee condition and make the replacement surgery necessary years earlier than would have otherwise been the case. He stated that appellant was able to work without restriction until he had his March 16, 1999 injury. Appellant also submitted an October 22, 2006 report from Dr. Israelite who stated that since the arthroscopic surgery was accepted as related to the work injury this was sufficient evidence that the work injury at least contributed in part to the further deterioration of the knee.

By decision dated February 23, 2007, an Office hearing representative affirmed the August 17, 2006 decision. She found that the weight of the evidence was represented by Dr. Didizian.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act 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, which the Office

considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[2] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[3]

ANALYSIS -- ISSUE 1

Appellant filed a claim for compensation based on disability resulting from an April 1, 2002 total left knee replacement surgery. The initial question presented is whether the surgery was necessitated by the employment injury. On this issue, there was a conflict in the medical evidence. Attending physicians Dr. DiStefano and Dr. Israelite opined that the surgery was related to the March 16, 1999 employment injury. The second opinion physician, Dr. Smith, opined that the surgery was necessitated by the underlying progression of the degenerative knee condition, not the employment injury. 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 the examination.[4]

The orthopedic surgeon selected as an impartial medical specialist examiner, Dr. Didizian, provided a rationalized medical opinion that the April 1, 2002 surgery was not necessitated by an employment injury. He explained that appellant had preexisting degenerative arthritis and it was the natural progression of this condition that caused the need for a total knee replacement. Dr. Didizian discussed the medical evidence and found that the employment injury did not advance the timing of the April 1, 2002 surgery. 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 a proper factual and medical background, must be given special weight.[5] The Board finds that the opinion of Dr. Didizian is entitled to special weight.[6]

Appellant submitted a report from Dr. Lefkoe who indicated that he believed that the March 16, 1999 injury accelerated the need for surgery. He did not provide a rationalized medical opinion based on a complete background, as his rationale appeared to be that, if the

[2] 5 U.S.C. § 8103(a).

[3] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[4] 5 U.S.C. § 8123.

[5] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[6] Appellant argued that Dr. Didizian was not properly selected as an impartial medical examiner. He did not ask to participate in the selection of the impartial medical examiner and there was no evidence that Office procedures were not followed in this case. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 2003).

injury was severe enough to require arthroscopic surgery it must be severe enough to contribute to a knee replacement. The need for arthroscopic surgery in 1999 and a total knee replacement in 2002 are separate issues and there must be a clear explanation as to how the employment injury contributed to the need for a total knee replacement. The report of Dr. Lefkoe is not of sufficient probative value to create a new conflict. Appellant also submitted an October 22, 2006 report from Dr. Isrealite who was on one side of the conflict resolved by Dr. Didizian. Additional reports from a physician on one side of the conflict that is properly resolved by an impartial specialist are generally insufficient to overcome the weight accorded the impartial specialist's report or create a new conflict.[7]

The Board, accordingly, finds that the Office properly found that the weight of the medical evidence was represented by the impartial medical examiner. There is no evidence that the Office abused its discretion in denying reimbursement for the April 1, 2002 surgery.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act[8] has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[9] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[10]

ANALYSIS -- ISSUE 2

Appellant filed a claim for compensation commencing April 1, 2002 based on his total left knee replacement surgery on that date.[11] It is his burden of proof to submit rationalized medical evidence establishing an employment-related disability. As noted above, the weight of the medical evidence establishes that the April 1, 2002 left knee total replacement was not employment related. Since appellant's claim is based on disability resulting from the surgery, the Board finds he has not met his burden of proof in this case.

CONCLUSION

The Office properly determined that the weight of the medical evidence established that the April 1, 2002 total left knee replacement surgery was not necessitated by an employment-

[7] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] 20 C.F.R. § 10.5(f); *See, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[11] Appellant also filed a CA-2a form, but this clearly is not a "spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure." 20 C.F.R. § 10.5(x).

related condition. Appellant did not meet his burden of proof to establish that the disability resulting from the surgery was employment related.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 23, 2007 and August 16, 2006 are affirmed.

Issued: January 11, 2008
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