

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

C.S., Appellant)

and)

DEPARTMENT OF THE ARMY, TRADOC,)
CIVILIAN PERSONNEL OFFICE, Fort Dix, NJ,)
Employer)

**Docket No. 08-1413
Issued: August 19, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 25, 2008. 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 a modification of the May 18, 2000 wage-earning capacity determination was warranted.

FACTUAL HISTORY

The case was before the Board on prior appeals. By decision dated June 10, 2002, the Board affirmed a May 18, 2000 wage-earning capacity determination based on the selected position of telephone solicitor.¹ In an order dated February 20, 2008, the Board remanded the

¹ Docket No. 01-1485 (issued June 10, 2002).

case to the Office for a proper decision on the issue presented.² The Board noted that the Office had issued a May 18, 2000 wage-earning capacity determination. With respect to a claim for compensation as of September 4, 2001, when appellant underwent right knee surgery, the Board indicated that the proper issue was whether the wage-earning capacity determination should be modified. The history of the case is contained in the Board's prior order and is incorporated herein by reference.

The Board notes that the Office accepted bilateral knee contusions and a torn left medial meniscus in the performance of duty on March 19, 1992 when she fell to the floor. The record indicates that appellant had sustained an employment-related left tibial plateau fracture on March 20, 1991 when she was involved in an altercation with a patient. As noted above, she underwent right knee arthroscopic surgery on September 4, 2001.

On the issue of whether the September 4, 2001 surgery was employment related, the Office found a conflict in the medical evidence existed between attending physician Dr. Eric Mitchell and second opinion physician Dr. Anthony Salem. In a report dated August 7, 2003, Dr. Salem opined that appellant's right knee condition and the September 4, 2001 surgery were not causally related to the March 19, 1992 employment injury. Dr. Mitchell disagreed with Dr. Salem, opining that the surgery was necessitated by the employment injury.

The Office initially referred appellant to Dr. Bong S. Lee, a Board certified orthopedic surgeon. In a May 30, 2006 report, Dr. Lee opined that the right knee condition was preexisting and not causally related to the employment injury. The Office determined that he had previously been involved in the case, and therefore he could not serve as a referee physician. Appellant was referred to Dr. John Williams, a Board-certified orthopedic surgeon. In a report dated August 29, 2006, Dr. Williams provided a history and results on examination.³ He reviewed the medical evidence of record. Dr. Williams stated that appellant had preexisting pathology in both knees. He further stated:

“With reference to the right knee, [appellant's] subsequent total knee arthroplasty, in my opinion, would not be the result of the “accident” [on] March 19, 1992. This would be on the basis of her having degenerative joint disease, which is arthritis. Back in 1999 with Dr. Stein, [appellant's] x-rays showed that she has more advanced degenerative changes in the left knee than the right knee. The left one is the one that she had a fracture of and the left knee is the one that she had scoped and the left knee is her problem referable to the accident of 1991. But [appellant] apparently returned to work following that incident and then had this incident in 1992 but it was again a result of the left knee. I do not see the right knee as being related to her right total knee arthroplasty.”

By decision dated October 6, 2006, the Office denied a claim for compensation commencing September 4, 2001. On remand following the Board's February 20, 2008 order, it

² Docket No. 07-1047 (issued February 20, 2008).

³ According to Dr. Williams, appellant reported the date of the fall at work as March 19, 1991. He later reviewed the statement of accepted facts and noted that March 20, 1991 was the date of the left leg injury.

issued a March 25, 2008 decision. The Office found that the medical evidence was not sufficient to establish a modification of the May 18, 2000 wage-earning capacity determination.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

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.⁶

ANALYSIS

The Office determined on May 18, 2000 that the selected position of telephone solicitor represented appellant's wage-earning capacity. Appellant underwent right knee surgery on September 4, 2001 and the issue is whether the evidence is sufficient to warrant modification of the wage-earning capacity on or after September 4, 2001. The Board previously reviewed and affirmed the May 18, 2000 decision, and there is no evidence that the original determination was erroneous. The Office does not purport that appellant has been retrained or vocationally rehabilitated. The issue is whether there was a material change in the nature and extent of the injury-related condition.

With respect to the right knee, the Board notes the accepted condition was a right knee contusion. The Office found a conflict existed on the issue of whether the September 4, 2001 surgery was employment related.⁷ The initial physician selected as a referee was Dr. Lee. Since he had previously been involved in the case, his report could not resolve the conflict.⁸ Appellant

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁷ The Federal Employees' Compensation 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. 5 U.S.C. § 8123(a). The implementing regulations 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 it will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

⁸ *See Raymond E. Heathcock*, 32 ECAB 2004 (1981).

argues that Dr. Lee's report should have been excluded from the record, but this is not a situation that requires a medical report to be excluded.⁹

Dr. Williams as a referee physician provided a rationalized medical opinion that the September 4, 2001 surgery was not the result of an employment injury. He provided an unequivocal opinion based on a complete history that the surgery was needed for a preexisting degenerative condition that was not employment related. The Board finds that Dr. Williams' report represents the weight of the medical evidence on the issue. As noted above, a well-rationalized opinion from a referee physician that is based on a proper background is entitled to special weight.

The medical evidence of record does not establish a material change in the employment-related condition after September 4, 2001. Appellant continued to receive treatment for her right knee, but none of the physicians provided an opinion establishing a material change on an employment-related condition. For example, a June 15, 2005 report from Dr. Ghassem Kalani, a physiatrist, provided an inaccurate history that she injured her right leg in a March 1990 altercation with a patient and did not provide an opinion establishing a material change in an employment-related condition. In an August 6, 2007 report, Dr. Roy Lefkoe, an orthopedic surgeon, provided a history and results on examination, without offering an opinion on the issues presented. The Board finds the evidence is not sufficient to warrant a modification of the wage-earning capacity determination on or after September 4, 2001.

CONCLUSION

The Board finds the Office properly denied modification of the May 18, 2000 wage-earning capacity determination.

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995). Exclusion of a medical report is required if the physician selected for the referee examination regularly performs fitness-for-duty examinations, a second referee is selected before the Office has attempted to clarify the original referee's report, a report is obtained through telephone contact or leading questions have been posed to the physician.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 25, 2008 is affirmed.

Issued: August 19, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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