

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

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**L.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Seattle, WA, Employer**

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**Docket No. 08-1270  
Issued: July 2, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 1, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated February 1, 4 and 29 and March 13, 2008, finding that he had sustained consequential injuries and was not entitled to additional wage-loss compensation concurrent with the period of a schedule award. 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's left knee and back strain conditions were consequential to his accepted right knee injury; and (2) whether appellant is entitled to receive compensation for wage loss concurrently with a lump-sum schedule award payment.

**FACTUAL HISTORY**

On December 19, 2003 appellant, then a 55-year-old rural carrier, sustained injury to his right arm and leg when he slipped on ice in the performance of duty. The Office accepted his claim for right shoulder and right thigh strains, a torn meniscus of the right knee and a right

shoulder rotator cuff tear.<sup>1</sup> On February 3, 2005 appellant was placed on the periodic rolls in receipt of wage-loss compensation.

On October 18, 2005 appellant received schedule awards for 22 percent impairment of the right arm and 24 percent impairment of the right leg. The period of the awards ran from August 16, 2005 to April 6, 2008. On October 24, 2005 appellant requested that his schedule awards be paid in a lump sum. In a letter dated November 3, 2005, the Office advised appellant that a lump-sum payment would represent full and final compensation for the period of the award and that additional wage-loss benefits could be reinstated at a later date for temporary disability. On November 7, 2005 appellant signed an agreement, accepting the lump-sum payment with the understanding that no further monetary compensation would be paid during the period of the award.<sup>2</sup> The Office issued appellant's lump-sum payment on November 15, 2005.<sup>3</sup>

On August 7, 2006 appellant was treated by Dr. Douglas G. Norquist, a Board-certified orthopedic surgeon. He related that appellant sustained injury to his right knee in a fall two years prior for which arthroscopy was performed. He also listed a prior lateral meniscectomy performed in 1999. Dr. Norquist noted that appellant stood at work to case mail, favoring his right side and had developed back and left leg pain. He recommended right knee replacement arthroplasty which was performed on October 23, 2006. Following surgery, appellant was placed in physical therapy. On January 22, 2007 appellant's continuing complaint of low back and left leg pain was noted. Appellant attributed his complaints to an abnormal gait and focusing on his right knee condition. A physician's assistant in Dr. Norquist's office noted that she addressed abnormal gait patterns with appellant.

On February 5, 2007 appellant filed an occupational disease claim asserting that lifting activities in his federal employment had aggravated the degenerative disc disease of his low back. He also alleged a left knee strain as he favored his injured right knee and placed extra weight on his left leg.<sup>4</sup>

By report dated March 15, 2007, Dr. Judith A. Heusner, a specialist in physical medicine and rehabilitation, provided a disability retirement evaluation. She obtained a history that appellant initially injured his right knee at work in 1999 and was treated for a torn meniscus. He subsequently returned to work as a rural letter carrier but exacerbated his right knee in the December 19, 2003 fall. As it became intolerable for appellant to bear his weight on the right leg, a total knee replacement surgery was performed. Thereafter, appellant continued to favor

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<sup>1</sup> The record reflects that appellant underwent a prior meniscectomy of his right knee in 1999.

<sup>2</sup> Appellant agreed to accept \$74,644.78 in compensation for the commuted value of further installment payments under the schedule award payable from October 30, 2005 to April 6, 2008. The agreement noted that payment represented full and final settlement of the schedule award in connection with his December 19, 2003 employment injury and that no further monetary compensation benefits would be extended for the duration of the award.

<sup>3</sup> On October 23, 2006 appellant underwent surgery for a total right knee replacement. The record indicates that appellant elected to receive retirement benefits under the Federal Employees' Retirement System.

<sup>4</sup> This claim was given File No. xxxxxx658.

his right knee due to pain, which caused increasing chronic low back pain and a left knee condition.

In a March 20, 2007 decision, the Office denied appellant's claim finding that the medical evidence was not sufficient to establish that his low back or left knee conditions were due to his federal employment or accepted injury.

Appellant requested an oral hearing on March 21, 2007 which was held on June 25, 2007. Additional treatment notes from Dr. Norquist described appellant's postsurgical treatment for a possible infection underneath his tibial component.

By decision dated September 7, 2007, an Office hearing representative directed the Office to combine appellant's right knee claim with his left knee and back claims and refer him for a second opinion examination.

On September 21, 2007 the Office referred appellant to Dr. George R. Harper, a Board-certified orthopedic surgeon. In a report dated October 8, 2007, Dr. Harper reviewed appellant's history of injury and medical treatment. He noted that appellant had undergone several surgical procedures for his right knee and right shoulder, most recently surgery on September 5, 2007 for removal of an infected total right knee replacement and antibiotic treatment. Dr. Harper set forth findings on examination of appellant's lumbar spine and lower extremities. He advised that appellant had preexisting spondylolysis at the lumbosacral level with a very slight spondylolisthesis and degenerative changes. Dr. Harper opined that appellant's back condition was congenital and that any aggravation of the low back by the right knee injury was temporary and resolved within two to three months. He stated that there was no causal relationship between appellant's ongoing low back condition and his work as a rural letter carrier. Dr. Harper stated that the preexisting spondylolysis had progressed in a normal manner. He addressed the ongoing problem with appellant's right knee and complications following surgical replacement, noting that it was not fixed or stable and was being treated appropriately for infection. Dr. Harper stated that appellant's left knee condition could have been aggravated by the right knee difficulties but that no surgical intervention could be considered until the right knee infection cleared up.

The Office requested that Dr. Harper provide a supplemental report further addressing the relationship of appellant's left knee condition and the accepted right knee injury. On November 27, 2007 Dr. Harper noted that, after the October 23, 2006 right knee replacement, appellant was diagnosed with an infection and at the time of his physical examination the total knee replacement had been removed. During this extended period, increased stress was placed on the left knee which accelerated any degenerative changes due to extra weight bearing. Dr. Harper examined appellant again on January 8, 2008 and obtained a magnetic resonance imaging (MRI) scan of the left knee on January 7, 2008. He diagnosed tri-compartment osteoarthritis with probable tear of the lateral meniscus. Dr. Harper stated, "With regard to the left lower extremity difficulty, this patient clearly had some preexisting degenerative arthritis that has been worsened by the difficulty with his right lower extremity." He characterized the aggravation to the left knee as permanent, noting that the right knee condition effectively doubled the stress on the left knee. Dr. Harper reiterated that appellant's low back condition had not been worsened by the right knee injury.

On January 22, 2008 the Office advised appellant that his left leg claim was accepted for a lateral meniscus tear. However, his back condition claim was still under development. In a February 1, 2008 decision, the Office informed appellant that his left knee meniscal tear was accepted as consequential to his right knee injury. The claims examiner noted that she had deleted the left knee code from appellant's left knee occupational disease claim and combined it into his accepted right knee claim. The Office advised appellant to submit all medical bills and inquiries under the right knee injury claim number. He filed a claim for wage-loss compensation from October 19, 2006 to January 25, 2008 under his left knee occupational disease claim number.

By decision dated February 4, 2008, the Office denied appellant's claim for wage-loss compensation on the grounds that he had received a lump-sum schedule award based on his right knee injury and was not eligible for concurrent wage-loss compensation benefits due to his consequential left knee condition. It noted that the lump-sum payment was for the period through April 6, 2008 and that wage-loss compensation could not be paid as it would constitute a dual benefit. The Office advised appellant that the decision did not preclude payment of compensation for a different time period.

In a letter dated February 4, 2008, appellant questioned the Office's February 1, 2008 acceptance letter. He contended that the schedule award lump-sum agreement did not allow for inclusion of additional body parts and pertained only to his right shoulder and right leg injuries. Appellant again requested wage-loss compensation based on his accepted left knee condition.

As to appellant's low back condition, the Office found a conflict in medical opinion between Dr. Norquist, for appellant, and Dr. Harper, the second opinion specialist. It referred him to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 15, 2008 report, Dr. Hubbard provided a detailed factual and medical history and findings on physical examination. Diagnostic testing revealed a grade one anterolisthesis, L5 on S1, with multilevel degenerative disc disease. Dr. Hubbard diagnosed low back pain secondary to repetitive sprain/strain injury with left lower extremity sciatica. He stated that the primary connection of appellant's low back pain complaints and work was provided by his history of work activities performed and the onset of symptoms without a specific injury. He further stated, "The medical connection between the lower back diagnosis and the claimant's right leg is again provided by [appellant's] history of necessity to avoid full activity with the right lower extremity which in turn required him to rely on other body parts to compensate for the impairment including the lower back. Such physical compensation would legitimately be thought to place additional stress on the lower back."

On February 29, 2008 the Office accepted appellant's lumbar strain condition as a consequence of the December 19, 2003 right knee injury. He was advised to submit any medical bills and compensation claims under the right knee claim number.

By decision dated March 13, 2008, the Office reviewed appellant's claim for compensation based on his left knee condition and found that he was not entitled to receive compensation under a schedule award and wage loss for disability for work concurrently.

### LEGAL PRECEDENT -- ISSUE 1

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause.<sup>5</sup> The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has noted that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even if nonemployment related, is deemed because of the chain of causation to arise out of and in the course of employment and is compensable.<sup>6</sup> As held by the Board in *Charles R. Hollowell*,<sup>7</sup> if the result of the second incident could not have developed without the presence of damage from the primary employment-related incident, that primary incident is not exonerated. Liability under the Federal Employees' Compensation Act continues so long as the disability is in any part caused by the employment-related incident.<sup>8</sup>

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.<sup>9</sup>

### ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a meniscal tear of his left knee on January 22, 2008 under his occupational disease claim. In a February 1, 2008 decision, the Office found that appellant's left knee meniscus tear was consequential to his right knee injury based on the reports from Dr. Harper, a Board-certified orthopedic surgeon and second opinion physician, and Dr. Heusner. In so doing, the Office modified the basis for its acceptance of appellant's claim. The Board finds that the medical and factual evidence of record supports the Office's determination that appellant's left knee and low back conditions are a consequence of his accepted right knee injury.

The physicians of record are in agreement that appellant bore more weight on his left leg due to the injury to his right knee and that this contributed to an aggravation of the degenerative changes in his left knee and torn meniscus. The treatment records of Dr. Norquist clearly indicate that, following acceptance of the 2003 right knee injury, appellant underwent surgical procedures for a partial medial meniscectomy and culminating in a total knee replacement in 2006 that was not successful due to infection. Additional right knee surgery was performed in

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<sup>5</sup> *Debra L. Dillworth*, 57 ECAB 516, 519 (2006).

<sup>6</sup> *Kathy A. Kelley*, 55 ECAB 206 (2004). See also *Anthony S. Wax*, 7 ECAB 330 (1954).

<sup>7</sup> 8 ECAB 352 (1955).

<sup>8</sup> *Id.* at 355-56.

<sup>9</sup> As a general principle of workers' compensation law, the party initiating processes to accomplish a modification of an award of compensation has the burden of showing the correctness of the proposed modification. See *Fred Foster*, 1 ECAB 127 (1948).

2007.<sup>10</sup> Dr. Norquist addressed appellant's complaint of increasing weakness and pain in the left leg. He attributed the significant left knee weakness to the fact that appellant compensated by placing additional weight bearing on the left leg, favoring his right leg.

On March 15, 2007 Dr. Heusner conducted a disability retirement evaluation, noting that appellant initially injured his right knee on February 17, 1999 and was treated for a torn meniscus. He returned to work as a rural letter carrier but experienced increasing pain in the right leg, exacerbated by the fall on December 19, 2003. She noted that it became intolerable for appellant to bear weight on his right leg and a total knee replacement surgery was performed in 2006. However, due to persistent right knee pain, appellant favored his right lower extremity which caused increasing chronic low back pain and a left knee condition. In turn, Dr. Harper agreed that appellant had preexisting degenerative arthritis of the left lower extremity which was permanently aggravated and made worse by his right knee injury and the inability to bear weight on that leg.

Appellant contends that the Office modified the basis for acceptance of his claim only after he sought wage-loss compensation under the left leg occupational disease claim. The Board finds that the weight of medical opinion supports the Office's determination to modify the basis on which appellant's claim was accepted. As noted, the physicians agree that appellant's left knee condition developed as a consequence of the accepted injury to his right knee. The progression of his right knee injury and multiple surgeries and infection had a direct impact on both his gait and ability to bear weight resulting in the aggravation of the degenerative disease of his left leg and meniscus tear.

The weight of medical opinion also supports that appellant's low back condition was consequential to his right knee injury. A conflict in medical opinion arose between Dr. Norquist, his attending physician, and Dr. Harper, an Office referral physician. Dr. Norquist advised that in favoring his right knee, appellant developed an abnormal gait which aggravated the degenerative disease of his low back. Dr. Harper, however, opined that appellant's right knee injury and medical treatment did not cause or aggravate appellant's preexisting degenerative disc disease. He attributed appellant's back condition to the natural progression of the disease process. Dr. Hubbard, the impartial medical specialist, provided a thorough review of the medical records and presented findings on examination of the lumbar spine. He noted that appellant attributed his complaints of low back pain, by history, to work activities and not to any specific traumatic injury. He stated: "The medical connection between the lower back diagnosis and the claimant's right leg is again provided by [appellant's] history of necessity to avoid full activity with the right lower extremity which in turn required him to rely on other body parts to compensate for the impairment including the lower back. Such physical compensation would legitimately be thought to place additional stress on the lower back." Based on the report of the

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<sup>10</sup> Surgery which is performed as a result of an employment injury and which causes further impairment constitutes a consequential injury. *Bonnie D. Jefferson*, 34 ECAB 1426 (1983). See also *Melody Friery*, 48 ECAB 525 (1997).

impartial medical specialist, the Board finds that the Office properly accepted appellant's low back condition as a consequence of his right knee injury.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.422(b) of the Office's regulations provides the Office with discretion to make a lump-sum payment to an employee entitled to a schedule award under section 8107 when such a payment is in the employee's best interest.<sup>12</sup> In turn, section 8116(a) of the Act provides that an employee who receives a lump sum in commutation of installment payments until the expiration of the period during which such payments continue, may not receive salary, pay or other remuneration of any type from the United States.<sup>13</sup> It is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.<sup>14</sup> A claimant may not concurrently receive compensation under a schedule award and wage-loss compensation for disability.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

On December 19, 2003 appellant sustained injury to his right knee and right shoulder. He received schedule awards for permanent impairment to his right leg and right arm on October 18, 2005, the period of the awards to run from August 16, 2005 to April 6, 2008. Appellant subsequently requested payment in the form of a lump sum. On November 3, 2005 the Office advised appellant that the lump-sum payment would constitute full and final compensation under the awards and that no further monetary compensation would be paid during the period of the awards. Appellant agreed to the lump sum on November 7, 2005 and received \$74,644.78 in compensation for the commuted value of further installment payments. The record on appeal indicates that, during the period of his schedule awards, appellant was in receipt of retirement benefits from the Office of Personnel Management.<sup>16</sup>

Appellant subsequently submitted a claim for wage-loss compensation for the period October 19, 2006 to January 25, 2008 under the left knee occupational disease claim number. However, the period claimed is covered under the schedule award lump-sum agreement entered with the Office on November 7, 2005. Such award of benefits is prohibited as a dual benefit for

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<sup>11</sup> The Board has held that, where a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist is given special weight when sufficiently well-rationalized and based upon a proper factual background. *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>12</sup> 20 C.F.R. § 10.422(b).

<sup>13</sup> 5 U.S.C. § 8116(a); *see Dale Mackleprang*, 55 ECAB 174 (2003).

<sup>14</sup> *James A. Earle*, 51 ECAB 567, 568 (2000).

<sup>15</sup> *Id.*

<sup>16</sup> Section 8116(a) does not impair the right of a retired federal employee from receiving compensation for a schedule award under section 8107. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.6(b) (February 1995). *See also Richard A. Mattson*, Docket No. 06-264 (issued March 17, 2006); *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

the same injury. It is well established under section 8116(a) that appellant may not receive compensation under a schedule award concurrently with wage-loss compensation benefits arising from his right knee injury.<sup>17</sup> The Office advised appellant that he could file for wage-loss compensation following the expiration of the schedule award.

**CONCLUSION**

The Board finds that appellant sustained consequential conditions to his left knee and low back as a result of his accepted right knee injury. Moreover, appellant is not entitled to wage-loss compensation based on his consequential left knee condition concurrent with the period of payment under a lump-sum schedule award for his right leg impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 13 and February 29, 4 and 1, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: July 2, 2009  
Washington, DC

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

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

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

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<sup>17</sup> See Dale Mackelprang, *supra* note 13.