United States Department of Labor
Employees' Compensation Appeals Board

T.K., Appellant	)	
and	)	**Docket No. 10-445**
	)	**Issued: December 6, 2010**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Denver, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
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 November 23, 2009 appellant, through his attorney, filed a timely appeal of an August 27, 2009 Office of Workers' Compensation Programs' merit decision denying his consequential injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant sustained a consequential right-knee injury as a result of his accepted left knee condition.

FACTUAL HISTORY

This case has previously been before the Board. On July 19, 1991 appellant sustained injury to his left knee. The Office accepted his claim for torn meniscus in the left knee on September 9, 1991. On November 11, 1991 Dr. Willard Schuler, a Board-certified orthopedic surgeon, performed an arthroscopic examination that did not reveal any tear of the medial meniscus. The Office also accepted the condition of left knee strain. It listed appellant's

concurrent conditions as right knee medial meniscal tear and right arthroscopy in 1982 with right knee surgeries in 1981, 1986, 1988, 1989, January 23 and February 5, 1993. The Office granted appellant a schedule award for five percent impairment of his left lower extremity in 1995. It terminated appellant's compensation benefits by decision dated September 25, 1995 on the grounds that he refused suitable work. In an August 12, 1999 decision, the Board set aside the Office's May 28, 1997 decision denying appellant's hearing request as untimely.[1] The facts of the case as set out in the Board's prior decision are incorporated herein by reference.

On March 21, 2001 appellant filed a notice of recurrence of disability alleging that both knee conditions had worsened and that he was considering disability retirement. In a memorandum dated April 12, 2002, the Branch of Hearings and Review directed the Office to issue a final decision regarding appellant's claimed disability due to his consequential right knee condition. The Office accepted that appellant had sustained a recurrence of disability on January 25, 2001. It did not specify the conditions which lead to the acceptance of the recurrence. The Office granted appellant a schedule award for an additional 21 percent impairment of his left lower extremity on July 9, 2002.

Beginning on May 26, 1993, appellant's attending physician, Dr. Wayne K. Gersoff, a Board-certified orthopedic surgeon, diagnosed bilateral knee problems. He stated that appellant was placing a great deal of stress on his right knee in an attempt to rehabilitate and strengthen his left knee. In a letter dated September 3, 1993, the Office requested additional information from Dr. Gersoff regarding appellant's right-knee condition. On December 15, 1993 Dr. Gersoff stated that appellant had sustained an aggravation of his right knee due to the rehabilitation of his left knee as he was putting more stress on his right knee. At that time, appellant's right knee symptoms had decreased from the initial exacerbation of three or four months. Dr. Gersoff stated that due to his service-related right knee injuries and surgeries he experienced chronic right knee pain.

Dr. David C. Bachman, a Board-certified orthopedic surgeon and second opinion physician, completed a report on June 15, 1994 noting that appellant initially sustained a right knee injury while in the Navy in December 1979. Appellant underwent right knee surgeries in 1981 for medial meniscectomy, in 1982 he underwent an arthroscopy, in 1983 he had an anterior cruciate ligament reconstruction as well as additional arthroscopies with debridement in 1986, 1988 and 1989.

A physician at the Department of Veterans Affairs, (VA) whose signature is illegible, submitted a report on October 19, 1995 and diagnosed severe degenerative arthritis in his right knee with osteophyte formation and the presence of two loose bodies. He noted that appellant had several reconstructive surgeries involving the anterior cruciate ligament and that his condition was severe enough to require a total knee replacement. Dr. Tedford, Luck, a VA physician, stated that appellant's latest x-rays confirmed severe degenerative arthritis in the knee with laxity of the left ankle tripartite ligament. He completed a form report on March 15, 2001 and diagnosed right three compartment severe degenerative disc disease requiring a total knee replacement. Dr. Luck stated that appellant's work at the employing establishment aggravated

[1] Docket No.97-2141 (issued August 12, 1999).

his arthritis and indicated with a checkmark "yes" that appellant's bilateral degenerative arthritis was caused or aggravated by his employment. On December 18, 2002 Dr. Connor McBryde, a VA physician, diagnosed bilateral degenerative arthritis and indicated with a checkmark "no" that this condition was not caused or aggravated by an employment activity. On June 16, 2003 the Office received an undated report from Dr. A. Poirhazka, a VA physician, who opined that appellant's right knee treatment and left knee injury in 1991. Dr. Poirhazka noted that appellant required treatment for bilateral knee pain, right greater than the left.

Appellant underwent a right knee total arthroplasty on May 5, 2004. In a decision dated December 17, 2004, the Branch of Hearings and Review remanded the case for the Office to pay compensation benefits beginning January 25, 2001 and to adjudicate the claim for a consequential emotional and a consequential aggravation of the preexisting right knee condition.

Dr. McBryde completed a form report on December 23, 2004 and diagnosed advanced tricompartment osteoarthritis requiring knee replacement. He indicated with a checkmark "yes" that appellant's condition was aggravated, but not caused by employment activities. Dr. McBryde also provided additional opinion regarding his ability to work.

Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon, provided a second opinion evaluation to the Office on March 4, 2005. He noted appellant's service-related right knee injury and resulting surgeries as well as his accepted left knee injury. Dr. Arnold reported his symptoms of walking with a cane, increasing left knee pain with ambulation and constant clicking, throbbing and aching in the right knee. He performed a physical examination and opined that appellant's left knee injury did not cause any increased damage to the right knee as no high-demand stress was being placed on the left knee either at work or in recreational activities. Dr. Arnold stated that the accepted left knee condition did not aggravate appellant's right knee and did not cause any further deterioration of the right knee as the preexisting injuries in the right knee of meniscal tear and anterior cruciate ligament injury were consistent with the resulting treatment of a total knee replacement.

The Office referred appellant for a second opinion psychiatric evaluation on May 30, 2005 with Dr. Bert S. Furmansky, a Board-certified psychiatrist, who reported appellant's history and examined him. Dr. Furmansky diagnosed chronic pain disorder with psychological factors, bipolar disorder, panic disorder and generalized anxiety disorder. He opined that these conditions were not due to appellant's employment injury.

The Office referred appellant for an additional second opinion evaluation with Dr. Randolph Pock, a Board-certified psychiatrist. In a report dated March 15, 2007, Dr. Pock reviewed appellant's medical history and diagnosed chronic pain disorder as well as bipolar disorder. He opined that appellant's chronic pain disorder predated his 1991 injury and that he was not capable of working.

Dr. A.C. Lotman, a Board-certified orthopedic surgeon, performed a second opinion evaluation on March 14, 2007 and noted appellant's history of injury. He found that examination of the left knee revealed mild patellofemoral grinding, apprehension and ballottement. Dr. Lotman opined that appellant had continuing residuals of his left knee injury

including mild patellofemoral and medial joint line tenderness with crepitation about the patellofemoral joint.

By decision dated April 26, 2007, the Office denied appellant's claim for consequential emotional conditions and aggravation of a right knee condition. Appellant requested an oral hearing on May 2, 2007. By decision dated August 8, 2007, the Branch of Hearings and Review found the case not in posture for a decision as the Office had provided with a description of the type of evidence required to establish his consequential injury claim.

In a letter dated August 9, 2007, the Office requested additional factual and medical information from appellant regarding each of his alleged consequential injuries. It allowed 30 days for a response. The Office requested supplemental reports from Drs. Pock and Lotman, providing them with the definition of a consequential injury. Dr. Lotman responded on October 1, 2007 and requested additional information regarding appellant's right knee surgeries. He stated that based on the information currently available, he did not believe that appellant's right knee was aggravated as a consequential injury from his left knee.

Dr. Pock responded on October 22, 2007 and stated that appellant received treatment of his right knee operation and pain prior to the left knee injury. He diagnosed a preexisting chronic pain disorder, bipolar disorder and personality disorder. Dr. Pock stated, "I do not see sufficient evidence that his emotional condition is a consequence of the accepted left knee injury."

Appellant provided his records from the VA. Dr. Lotman reviewed this evidence and submitted a report dated November 28, 2007 stating that appellant's left knee injury did not contribute to his current right-knee condition by direct cause, aggravation, acceleration or precipitation.

By decision dated December 10, 2007, the Office denied appellant's claim for consequential injury.

Appellant requested an oral hearing on December 13, 2007. He submitted a report dated March 26, 2008 from a VA physician, noting appellant's history of injury and right knee arthroplasty in May 2004, as well as his left knee injury in 1991. A VA physician stated, "Since he injured his left knee, [appellant] developed more pain in his right knee secondary to his antalgic gait and overcompensation while walking. This ultimately became a partial factor in [appellant] requiring the total knee replacement on the right."

Appellant testified at the oral hearing on March 28, 2008 and alleged that his employment duty of standing on concrete aggravated his preexisting right knee condition beginning in 1986 when he joined the employing establishment. He submitted a report dated July 1, 2002 from Dr. John L Wiberg, a psychiatrist from the VA which noted that appellant first sought psychiatric treatment on October 13, 1995 and was diagnosed with depression, anxiety and inability to concentrate. By decision dated December 16, 2008, the hearing representative remanded appellant's claim for additional development of the medical evidence regarding his consequential right-knee injury finding a conflict of medical opinion evidence between Drs. Arnold and Lotman for the Office and Dr. Gersoff and the VA physicians for appellant.

The hearing representative remanded the case for an impartial medical evaluation. The hearing representative further found that the Office properly denied appellants' claim for a consequential emotional condition.

The Office referred appellant for an impartial medical examination with Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon. Appellant's attorney objected to the selection of Dr. Sabin, alleging that he was biased by his interest in maintaining his economic relationship with the Office and predicable in his evaluations. Dr. Sabin completed a report on February 19, 2009 and reviewed the medical records. He found that there was no evidence of further deterioration of the right knee due to the left knee incident. Dr. Sabin stated, "I cannot comment or argue whether the patient had more pain after the left knee injury as that certainly could be possible but again, no material change, I believe, would have occurred in the right knee to cause that pain." He concluded that appellant's right knee condition was a natural progression of his preexisting conditions and surgeries. By decision dated February 26, 2009, the Office denied appellant's claim for a consequential right knee injury resulting from his accepted left knee condition.

Appellant, through his attorney, requested an oral hearing. He submitted a note dated May 27, 2009 from Dr. Harvey J. Navrkal, a Board-certified orthopedic surgeon, described appellant's history of right and left knee injuries and his current findings. Dr. Navrkal stated, "I do believe that it is clear that the injury and subsequent surgery on his left knee that occurred in 1991 was a partial and contributing factor of the ensuing degenerative cascade that lead to a need for a total right knee arthroplasty that was performed in 2004. I believe that this is supported by the fact that the patient does have an antalgic gait clearly document in his history as well as his examination findings today." Appellant testified at the oral hearing on June 26, 2009 and his attorney argued that Dr. Sabin should not have been selected as the impartial medical examiner as he was partners with Dr. Maruyama at the time that he served as the impartial medical examiner in this case.

By decision dated August 27, 2009, the hearing representative found that Dr. Sabin's report represented the weight of the medical evidence and established that appellant did not have a consequential right knee injury.

LEGAL PRECEDENT

It is an accepted principle of worker's compensation law 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 which is attributable to the employee's own intentional conduct. As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the

progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.[2]

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[3]

Section 8123(a) of the Federal Employees' Compensation Act,[4] provides, "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." A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[5] The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) must exclude physicians previously connected with the claim or claimant or physicians in partnership with those already so connected.[6]

ANALYSIS

Appellant has alleged that he developed a consequential right-knee injury as a result of his accepted left knee injury. His physicians from the VA supported this causal relationship. The second opinion physicians selected by the Office, Drs. Arnold and Lotman, opined that there was no causal relationship between appellant's right knee replacement and his accepted left-knee injury. Due to these opposing opinions, the Office found conflict of medical opinion evidence requiring referral to an impartial medical specialist. The Board finds that there is a conflict of medical opinion on the issue of whether appellant sustained a consequential right knee injury. The Office referred appellant to Dr. Sabin to resolve this conflict.

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[2] *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

[3] *Charles W. Downey*, 54 ECAB 421 (2003).

[4] 5 U.S.C. §§ 8101-8193, 8123(a).

[5] *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(3)(b) (October 1995).

Before the hearing representative and on appeal, appellant's attorney argued that appellant's right knee replacement was contributed to by his accepted left knee injury due to his antalgic gait and overcompensation while walking. He further alleged that Dr. Sabin was not properly selected as the impartial medical examiner as his former partner, Dr. Maruyama, had previously acted as an impartial medical examiner in this case. Appellant's attorney alleged that there was an unresolved conflict of medical opinion regarding appellant's alleged consequential right knee condition. The Board agrees.

Dr. Maruyama completed an impartial medical examination of appellant on May 25, 2001. Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, was listed as partner in the group letterhead at the time of this examination. By the time the Office referred appellant to Dr. Sabin for an impartial medical examination, in 2009 he was no longer in partnership with Dr. Maruyama, as indicated by his letterhead. However, the Board has held that a physician serving as an impartial medical examiner should be one who is wholly free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on a prior examination.[7] The Board has held that a physician selected as an impartial medical specialist cannot be considered completely independent when an associate has previously served as an Office referral physician in the case.[8]

The importance of safeguarding the independence of impartial medical specialist is recognized in the Office's procedures. Under the Office's procedures, "physicians previously connected with the claim or the claimant or physicians in partnership with those already so connected" may not be used as impartial medical specialists.[9]

The Board notes that the January 8, 2009 referral letter to Dr. Sabin advised that he have no prior connection to the employee or employing establishment but did not apprise him of prior association with physicians previously connected with the claim or claimant or those in partnership with those so connected.[10]

As Dr. Sabin was a partner with Dr. Maruyama at the time that Dr. Maruyama conducted an impartial examination of appellant, there is an appearance of impropriety due to their previous association. The Board finds that Dr. Sabin was not properly selected as the impartial medical examiner. The conflict of medical opinion evidence remains unresolved.

On remand, the Office should follow its procedures and refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to determine whether he sustained a consequential right knee injury due to his accepted left knee conditions.

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[7] *Ronald Santos*, 53 ECAB 742 (2002); *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(3)(b) (October 1995).

[10] *Id. See D.L.*, 61 ECAB __ (Docket No. 09-1549, issued February 23, 2010); *Joseph A. Muszel*, (Docket No. 05-762, issued September 23, 2005).

CONCLUSION

The Board finds that the case is not in posture for decision due to unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for additional development consistent with the decision of the Board.

Issued: December 6, 2010
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