

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

A.A., Appellant

and

**DEPARTMENT OF JUSTICE, U.S. DISTRICT
COURT, Philadelphia, PA, Employer**

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**Docket No. 09-1998
Issued: July 7, 2010**

Appearances:

*Aaron B. Aumiller, 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 August 3, 2009 appellant filed a timely appeal from a February 6, 2009 decision of the Office of Workers' Compensation Programs denying her claim for a left knee condition. 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 sustained an aggravation of a preexisting left knee condition as a result of her accepted July 4, 2003 employment injury.

FACTUAL HISTORY

This case was previously before the Board.¹ By order dated August 18, 2006, the Board set aside a March 9, 2006 Office decision and remanded the case for further development of the medical evidence. The Board instructed the Office to refer appellant to an impartial medical

¹ See Docket No. 06-1011 (issued August 18, 2006).

specialist to resolve a conflict in medical opinion as found by an Office hearing representative in a November 14, 2005 decision.

On July 8, 2003 appellant, then a 50-year-old deputy clerk, filed a traumatic injury claim alleging that on July 4, 2003 she injured her head, neck and right shoulder, leg and eye when a wood and steel frame fell onto her as she attended the opening of the National Constitution Center. She was off work for three days and then returned to part-time work. On September 4, 2003 appellant returned to full duty. The Office accepted her claim for cervical and right shoulder strains and contusions of the face, scalp and neck.

In a July 26, 2004 report, Dr. Paul A. Marchetto, an attending orthopedic surgeon, provided findings on physical examination. Appellant had left knee instability that had worsened since her July 4, 2003 employment injury when she was struck by some staging.² Dr. Marchetto recommended arthroscopic surgery consisting of acromioclavicular (ACL) reconstruction using an Achilles allograft.

In an October 11, 2004 report, Dr. Steven J. Valentino, a Board-certified orthopedic surgeon and an Office referral physician, reviewed the medical history and provided findings on physical examination. He found that the July 4, 2003 employment injury did not cause or aggravate appellant's left knee condition.

By decision dated October 29, 2004, the Office denied appellant's claim for left knee surgery on the grounds that the medical evidence did not establish that her left knee condition was causally related to her July 4, 2003 employment injury.

On November 22, 2004 appellant requested an oral hearing before an Office hearing representative that was held on August 17, 2005.

Following the hearing, appellant submitted a December 16, 2004 report from Dr. Joseph V. Vernace, an orthopedic surgeon, who reviewed the medical history and provided findings on physical examination. Dr. Vernace stated that medical reports from Dr. Marchetto, before and after the July 4, 2003 employment injury, showed that appellant sustained further injury to her preexisting left knee condition on July 4, 2003. He opined that appellant required ACL revision surgery as a result of the July 4, 2003 employment injury.

By decision dated November 14, 2005, an Office hearing representative found a conflict in medical opinion between Dr. Valentino and Dr. Vernace. The hearing representative instructed the Office to obtain medical reports from Dr. Marchetto regarding his treatment of appellant's left knee condition before and after the July 4, 2003 employment injury. These reports were referenced in Dr. Vernace's report but were not of record. The hearing representative instructed the Office to refer appellant to an impartial medical specialist after it obtained Dr. Marchetto's reports.

² On September 26, 2001 appellant was a pedestrian when she was struck by a car bumper and dragged during a nonwork-related accident. She injured her left knee and underwent surgery on October 31, 2001. She was off work for six months.

By decision dated March 9, 2006, the Office denied appellant's claim for a left knee condition. It noted that records from Dr. Marchetto had not been submitted and she could not be referred to an impartial medical specialist until the medical history record was complete.

Following the Board's August 18, 2006 remand, the Office referred appellant, together with the entire case file, a statement of accepted facts and a list of questions, to Dr. Zohar Stark, a Board-certified orthopedic surgeon and the impartial medical specialist selected to resolve the conflict in medical opinion.

In a June 7, 2007 report, Dr. Stark reviewed the medical history and provided findings on physical examination. Appellant sustained severe injuries to her left knee in the 2001 nonwork-related motor vehicle accident. She underwent reconstructive surgery of her knee ligaments. Dr. Stark noted that she did not wear a brace on June 7, 2007 or use any ambulating aids. On physical examination, appellant was able to walk with a reciprocating heel/toe gait but stated that she could not walk on her toes and would not attempt this maneuver. She could heel walk but complained of left knee pain. There was no sensory or motor deficit to her lower extremities. There was no effusion in her left knee or reduced quadriceps muscle strength or mass. There was tenderness on palpation over the patella borders the tibial tubercle area. Range of motion of the left knee was 0 to 120 degrees of flexion. Drawer and Lachman tests were negative and there were no signs of varus/valgus instabilities. In reviewing the medical history, Dr. Stark noted a discrepancy in that Dr. Valentino found no left knee instability but Dr. Vernace did find instability. He found no left knee instability during his examination of appellant. Dr. Stark stated that her accepted July 4, 2003 injuries to her neck, shoulders and face had resolved. He opined that appellant did not sustain any injury to her left knee on July 4, 2003 which altered the preexisting condition of the knee. The suggested left knee arthroscopic surgery with ACL reconstruction was not related to the July 4, 2003 employment injury. The need for surgery and her left knee limitations were residuals of her preexisting left knee condition.

In a July 1, 2008 decision, the Office denied appellant's claim for aggravation of her preexisting left knee condition and related surgery on the grounds that Dr. Stark's report established that her left knee condition was not aggravated by the July 4, 2003 employment injury.

On July 8, 2008 appellant requested a telephonic hearing that was held on November 14, 2008.

On August 6, 2008 Dr. Vernace reiterated his opinion that appellant reinjured her left knee during the July 4, 2003 incident. Appellant sustained a significant left knee injury in 2001 but was apparently functioning well until the July 4, 2003 incident greatly exacerbated her left knee condition. Dr. Vernace noted that appellant used a cane because of pain and left knee instability.

On November 7, 2008 Dr. Marchetto stated that appellant had regained significant left knee stability following the 2001 motor vehicle accident and was functioning without a knee brace. Appellant had decreased left knee stability following the July 4, 2003 employment injury. On November 7, 2008 she presented with severe left knee pain. Dr. Marchetto opined that

appellant sustained a new left knee injury on July 4, 2002 that accelerated the degradation of her left knee condition. He found that she needed a total left knee replacement.

On November 21, 2008 Dr. James J. Purtill, a Board-certified orthopedic surgeon and an associate of Dr. Marchetto, noted appellant's long history of severe left knee pain. He provided findings on physical examination and diagnosed severe left knee degenerative joint disease. Dr. Purtill discussed prospective left knee replacement surgery with appellant.

By decision dated February 6, 2009, an Office hearing representative affirmed the July 1, 2008 decision.³

LEGAL PRECEDENT

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁵ An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.

To establish a causal relationship between an employee's condition and any disability claimed and the employment event or incident, he or she must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

³ Subsequent to the February 6, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁴ *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

⁵ *T.H.*, 59 ECAB ____ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

⁶ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Section 8123(a) of the Act provides that “if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.”⁷ Where 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.⁸

ANALYSIS

The Office found a conflict in medical opinion between Dr. Vernace and Dr. Valentino as to whether the July 4, 2003 employment injury aggravated appellant’s preexisting left knee condition. It properly referred her to Dr. Stark for an impartial medical evaluation.

Dr. Stark reviewed the medical history and provided findings on physical examination. He noted that appellant sustained severe injuries to her left knee in a 2001 nonwork-related motor vehicle accident and underwent reconstructive surgery. Appellant did not wear a brace to her examination on June 7, 2007 or use any ambulating aids. On physical examination, she was able to walk with a reciprocating heel/toe gait but would not attempt to walk on her toes. Appellant could heel walk but complained of left knee pain. Dr. Stark found evidence of sensory or motor deficit to her lower extremities. There was no effusion in her left knee and or reduced quadriceps muscle strength or mass. Range of motion of the left knee was 0 to 120 degrees of flexion. Drawer and Lachman tests were negative and there were no signs of varus/valgus instabilities. Appellant had no left knee instability. In reviewing the medical history, Dr. Stark noted a discrepancy in that Dr. Valentino found no left knee instability but Dr. Vernace did find instability. He found that appellant’s accepted July 4, 2003 injuries to her neck, shoulders and face had resolved. Dr. Stark opined that appellant did not sustain any injury to her left knee on July 4, 2003 which altered the preexisting condition of the knee. The suggested left knee arthroscopic surgery with ACL reconstruction was not related to the July 4, 2003 employment injury. The need for surgery and her left knee limitations were residuals of her preexisting left knee condition. The report of Dr. Stark is based upon a complete and accurate factual and medical background and detailed findings on physical examination. Dr. Stark is Board-certified in orthopedic surgery, an appropriate field for evaluating appellant’s left knee condition. The Board finds that his thorough and well-rationalized report established that appellant’s preexisting left knee condition was not aggravated by the July 4, 2003 employment injury. Accordingly, the Office met its burden of proof in denying appellant’s claim for a left knee condition based on the medical opinion of Dr. Stark that the left knee condition and proposed surgery in 2007 were not causally related to the July 4, 2003 employment injury.

On August 6 and November 7, 2008 Dr. Vernace and Dr. Marchetto reiterated their opinion that appellant reinjured her left knee during the July 4, 2003 incident. Appellant sustained a significant left knee injury in 2001 but was apparently functioning well until the July 4, 2003 incident greatly exacerbated her left knee condition. An additional report from a

⁷ 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁸ *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

claimant's physician, which essentially repeats earlier findings and conclusions, is generally insufficient to overcome the weight accorded to an impartial medical specialist's report where appellant's physician had been on one side of the conflict in the medical opinion that the impartial medical examiner resolved.⁹ Dr. Vernace and Dr. Marchetto were on one side of the conflict which Dr. Stark's opinion was found to resolve. In their 2008 reports, they merely reiterated their opinions that appellant's preexisting left knee condition was aggravated by the July 4, 2003 employment injury. These reports are not sufficient to overcome the weight of Dr. Stark's medical opinion. The Board finds that the 2008 reports of Dr. Vernace and Dr. Marchetto are not sufficient to establish that appellant's left knee condition was aggravated by her July 4, 2003 employment injury.

On November 21, 2008 Dr. Purtil noted appellant's long history of severe left knee pain. He provided findings on physical examination and diagnosed severe left knee degenerative joint disease. Dr. Purtil discussed prospective left knee replacement surgery with appellant. He is an associate of Dr. Marchetto who, as noted, was on one side of the conflict in medical opinion resolved by Dr. Stark. Additionally, Dr. Purtil did not address the issue of the causal relationship of appellant's July 4, 2003 employment injury to her left knee condition. His report is not sufficient to establish that appellant's left knee condition was aggravated by her July 4, 2003 employment injury.

On appeal appellant contends that the December 16, 2004 report of Dr. Vernace established that her preexisting left knee condition was causally related to her July 4, 2003 employment injury. As noted, however, there was a conflict in medical opinion between Dr. Vernace and Dr. Valentino, requiring resolution of the conflict by an impartial medical specialist. She contends that Dr. Stark's report is deficient because he stated that she sustained injuries only to her neck, shoulders and face.¹⁰ Appellant contends that he was not aware that her knees were struck by a table during the July 4, 2003 employment incident. Dr. Stark noted that the history obtained from appellant included the fact that her knees were struck by a table in the July 4, 2003 employment incident. Appellant asserts that an injury to her knees is an accepted condition because the Office hearing representative accepted as factual that she established through her testimony an injury to her legs when the table where she was sitting on July 4, 2003 struck her knees. As noted, there are two components involved in establishing the fact of injury. First, the employee must establish that he or she actually experienced the employment incident at the time, place and in the manner alleged. The hearing representative found that appellant's testimony established the incident as alleged. However, the second component consists of medical evidence sufficient to establish that the employment incident caused a personal injury. The hearing representative did not find that the medical evidence established an injury to her legs. Rather, the hearing representative found a conflict in medical opinion as to whether the July 4, 2003 employment incident aggravated appellant's preexisting left knee condition.

⁹ See *Roger G. Payne*, 55 ECAB 535 (2004).

¹⁰ As noted, the Office accepted her claim for cervical and right shoulder strains and contusions of the face, scalp and neck.

Appellant contends that Dr. Stark did not provide rationale supporting his opinion that her preexisting left knee condition was not aggravated by the July 4, 2003 employment injury. Dr. Stark reviewed a description of her symptoms, including her complaint of left knee pain and locking but no numbness, tingling or weakness of the lower extremities, the fact that she had severe injuries to her left knee in the 2001 motor vehicle accident and underwent surgical reconstruction of her knee ligaments and the fact that she wore a left knee brace at the time of the July 4, 2003 employment injury but did not have a knee brace or ambulating aids at her June 7, 2007 examination with Dr. Stark. He noted the fact that appellant was off work for just one week following the July 4, 2003 employment injury, worked part time for four months and then returned to full duty (whereas she was off work six months for her 2001 left knee injury).¹¹ On physical examination, he listed her ability to perform a reciprocating heel/toe gait, her refusal to attempt toe walking and her complaint of left knee pain, a negative sitting root test, straight leg raising of 80 degrees bilaterally, no sensory or motor deficit of the lower extremities, normal deep tendon reflexes of the lower extremities and no left knee instability, effusion or reduced quadriceps muscle strength or mass. Left knee findings were normal except for tenderness on palpation over the patella borders and tibial tubercle area. Dr. Stark addressed information from his review of the medical records, including the fact that a September 18, 2003 note released appellant to full duty with no mention of left knee problems. He concluded that the July 4, 2003 employment injury did not aggravate her left knee injury. The Board found that the physician based his opinion on his physical examination of appellant, the history and symptoms she provided and a review of the medical records.

Appellant contends that Dr. Stark did not conduct an unbiased examination because he also performs second opinion examinations for the Office. The mere fact that he performs such examinations does not establish bias in his examination of appellant. Appellant provided no evidence of bias on the part of Dr. Stark.

CONCLUSION

The Board finds that appellant failed to establish that her preexisting left knee condition was aggravated by her July 4, 2003 employment injury.

¹¹ The September 6, 2006 statement of accepted facts noted that appellant was off work for six months following the 2001 motor vehicle accident, recuperating from surgery and undergoing physical therapy.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2009 is affirmed.

Issued: July 7, 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