

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

D.T., Appellant)	
)	
and)	Docket No. 09-1707
)	Issued: May 18, 2010
)	
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, West Haven, CT, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' February 12, 2009 merit decision denying her claim for consequential injury and medical treatment and an April 28, 2009 nonmerit decision denying her request for an oral hearing. 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 sustained a meniscus tear of her right knee as a consequence of her May 3, 2008 employment injury; and (2) whether the Office properly denied her request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

On appeal, appellant contends that her right knee condition for which she underwent surgery was due to her accepted injury.

FACTUAL HISTORY

On May 5, 2008 appellant, then a 44-year-old medical technician, filed a traumatic injury claim alleging that on May 3, 2008 she sustained injuries to her right arm and shoulder, left wrist

and leg, and lower back and right knee as a result of being struck by a patient. The patient wrestled with appellant, which caused her to fall. A coworker fell on her right knee.

By decision dated June 18, 2008, the Office denied appellant's claim. It found that the factual evidence was sufficient to establish that the May 3, 2008 incident occurred as alleged; however, the medical evidence was insufficient to establish that appellant sustained a medical condition causally related to the accepted incident.

In a June 11, 2008 medical report, Dr. John D. Kelley, an attending Board-certified orthopedic surgeon, provided a history that he first treated appellant in February 2008 for preexisting bilateral knee pain. He reviewed a September 28, 2007 magnetic resonance imaging (MRI) scan which demonstrated a medial meniscus tear and some degenerative changes of the right knee for which he performed surgery on February 26, 2008. Postoperatively, appellant underwent physical therapy. She was released to light-duty work on March 12, 2008. Dr. Kelley reviewed a history of the May 3, 2008 employment incident and advised that appellant sustained an employment-related strain of the right knee with aggravation of her preexisting right knee condition.

On June 30, 2008 appellant requested reconsideration of the Office's June 18, 2008 decision. By decision dated July 23, 2008, the Office set aside the June 18, 2008 decision. It accepted appellant's claim for aggravation of right knee strain.

On July 30, 2008 Dr. Kelley requested authorization for appellant to undergo additional MRI scan testing of the right knee which was approved by the Office on August 1, 2008.

On August 12, 2008 an MRI scan was performed by Dr. Philip A. Dinauer, a Board-certified radiologist, who found a small, truncated medial meniscus consistent with a partial medial meniscectomy, hyperintense defect at the junction of the body and posterior horn of the medial meniscus consistent with a meniscus re-tear, joint effusion and septated Baker's cyst, and chondromalacia in the lateral femorotibial compartment and mild fraying of the lateral meniscus.

On September 12, 2008 authorization for arthroscopic surgery for appellant's right knee medial meniscus re-tear was requested. It was accompanied by a July 30, 2008 report from Dr. Kelley who noted findings on physical examination of appellant's right knee. Dr. Kelley found mild antalgia on gait, mild effusion, some resisted patellofemoral compression, pain and crepitation, mild medial and lateral joint line tenderness and pain with Steiman maneuver medially and laterally. He obtained a new MRI scan to determine whether the May 3, 2008 injury caused a meniscal tear since appellant's February 26, 2008 arthroscopic knee surgery. In an August 27, 2008 report, Dr. Kelley reviewed the results of the MRI scan which showed a new tear at the posterior horn. He discussed surgery with appellant. Cortisone treatment had not given her any significant relief.

By letter dated October 20, 2008, the Office advised appellant that the evidence submitted was insufficient to authorize the proposed knee surgery. It requested additional factual and medical evidence, including a rationalized medical report from an attending physician which described the history of her current and prior nonwork-related injuries, and provided a diagnosis, results of examination and tests, symptoms, treatment provided and effect of the treatment and an opinion on how her current condition was caused by the May 3, 2008 injury.

In a November 12, 2008 report, Dr. Kelley reviewed a history of appellant's right knee condition prior to the May 3, 2008 injury which included the meniscus tear of the right knee for which she underwent arthroscopic surgery on February 26, 2008. He noted her May 3, 2008 injury and current knee-related symptoms. Dr. Kelley listed his findings on physical and diagnostic examination and diagnosed a re-tear of the medial meniscus. He opined that the diagnosed condition and the proposed arthroscopic knee surgery were causally related to the May 3, 2008 employment injury.

By letter dated November 28, 2008, the Office advised that the requests could not be authorized at that time as further medical development was necessary.

On December 23, 2008 appellant underwent right knee arthroscopic surgery which was performed by Dr. Kelley. In reports dated December 31, 2008 and January 28, 2009, he advised that she was doing well status post meniscal surgery.

In a December 31, 2008 report, Dr. Mark W. Scanlan, a neurologist, noted that appellant had no complaints one week status post meniscal surgery. He stated that her wounds were clean, dry and intact. Appellant had some mild swelling. She was able to move the right extremity and ambulate with the aid of crutches.

On February 2, 2009 Dr. Kelley released appellant to return to work without restrictions. On February 4, 2009 he ordered continued physical therapy for her right knee condition.

In a December 15, 2008 report, Dr. Thomas F. Sweeney, a Board-certified vascular surgeon, noted a history of appellant's episodes of deep venous thrombosis and pulmonary emboli. The deep venous thrombosis developed shortly after her arthroscopic knee surgery. Dr. Sweeney noted the medication used to treat appellant's knee condition and stated that she had injured her knee again which required possible surgical intervention.

By decision dated February 12, 2009, the Office found the medical evidence insufficient to establish that appellant sustained a meniscal tear of the right knee that required surgery due to her May 3, 2008 employment injury.

On March 17, 2009 appellant requested an oral hearing before an Office hearing representative accompanied by medical evidence regarding her knee condition.

By decision dated April 28, 2009, the Office's Branch of Hearings and Review denied appellant's request for a hearing as it was untimely filed. It reviewed her request and denied the hearing as it found that the issue of whether she sustained a consequential right knee injury that required surgery causally related to her accepted May 3, 2008 employment injury could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.¹ It is

¹ 5 U.S.C. § 8102(a).

an accepted principle of workers' 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 attributable to the employee's own intentional conduct.²

ANALYSIS -- ISSUE 1

The Office accepted appellant's original claim for aggravation of right knee strain. Appellant claimed that she sustained a meniscus tear of the right knee for which she underwent surgery on December 23, 2008 as a result of her May 3, 2008 employment injury. The Board finds that this case is not in posture for decision as to whether appellant's claimed consequential right knee condition and surgery are causally related to the accepted injury.

In a June 11, 2008 report, Dr. Kelley reviewed the May 3, 2008 employment incident and found a strain of right knee with aggravation of right knee strain. In an August 27, 2008 report, he noted a new tear at the posterior horn based on an August 12, 2008 MRI scan and recommended surgery. In a November 12, 2008 report, Dr. Kelley opined that appellant's re-tear of the medial meniscus of the right knee and proposed surgery were caused by the May 3, 2008 employment injury.

Dr. Sweeney's December 15, 2008 report noted appellant's history of deep venous thrombosis and pulmonary emboli. He advised that, following her knee arthroscopy, she reinjured her knee for which surgery was "possible."

The Board notes that, while none of the reports of appellant's attending physicians are completely rationalized, they are consistent in finding that she reinjured her knee, *via* a torn meniscus, because of the May 3, 2008 incident which necessitated additional surgery. These reports are not contradicted by any substantial medical or factual evidence of record.³ While the reports are not sufficient to meet appellant's burden of proof to establish a claim for a consequential right knee injury, they raise an uncontroverted inference of causal relationship between her torn meniscus of the right knee and resulting surgery and the May 3, 2008 employment injury.⁴

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁵

On remand, the Office should refer appellant, together with the case record and a statement of accepted facts, for examination by an appropriate specialist and a rationalized medical opinion as to whether appellant's meniscal tear and subsequent surgery were causally related to the May 3, 2008 employment injury. After such further development as it deems

² *Albert F. Ranieri*, 55 ECAB 598 (2004).

³ *E.J.*, 61 ECAB ___ (Docket No. 09-1481, issued February 19, 2010).

⁴ *Id.*; see also, *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Phillip L. Barnes*, 55 ECAB 426 (2004); see also *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

necessary, it shall issue an appropriate decision concerning appellant's claim for consequential injury and medical treatment.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant sustained a meniscus tear of the right knee that required surgery as a consequence of her May 3, 2008 employment injury.⁶

ORDER

IT IS HEREBY ORDERED THAT the April 28 and February 12, 2009 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: May 18, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁶ In light of the Board's ruling on the first issue, the second issue is moot.