

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

J.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
SAN DIEGO HEALTHCARE SYSTEM,
San Diego, CA, Employer**

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**Docket No. 10-48
Issued: October 5, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 7, 2009 appellant, through his attorney, filed a timely appeal of a June 5, 2009 Office of Workers' Compensation Programs' merit decision and a September 15, 2009 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merit and nonmerit issues of the case.

ISSUES

The issues are: (1) whether appellant established a consequential left knee injury; (2) whether the Office properly denied modification of appellant's wage-earning capacity prior to November 18, 2008; and (3) whether the Office properly denied his request for merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On February 28, 2001 appellant, then a 48-year-old escort, injured his right knee in the performance of duty when he tripped and fell while exiting an elevator. The Office accepted his

claim for sprain of the right knee and leg, a meniscal tear, internal derangement of the right knee and chondromalacia of the patella with osteoarthritis. Appellant underwent an authorized right knee arthroplasty on December 3, 2003. The Office granted him a schedule award for nine percent impairment of his right lower extremity on June 16, 2003. By decision dated April 27, 2005, it granted appellant a schedule award for an additional 37 percent impairment of his right lower extremity.

In a letter dated June 24, 2005, the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as an information clerk. It finalized this decision on July 29, 2005. Appellant reported that he was employed as a preparation cook at the University of California San Diego Medical Center beginning in March 2006.

By letter dated April 12, 2007, the Office informed appellant that he would be entitled to compensation under his wage-earning capacity determination beginning on May 3, 2007, after his schedule award ended. On May 2, 2007 it informed him that his compensation every 28 days was \$222.00.

Appellant telephoned the Office on February 27, 2008 and stated that he was not working due to increased problems with his right knee. In a letter dated February 27, 2008, the Office informed him of the requirements for filing a recurrence of disability and requested supportive medical evidence. It allowed 30 days for a response.

Appellant filed a notice of recurrence of disability on March 15, 2008 and alleged that he developed constant swelling and pain in his right knee on February 11, 2008 due to his February 28, 2001 employment injury. On February 13, 2008 Dr. Roman Cham, a Board-certified orthopedic surgeon, stated that appellant believed his work required him to stand too much and that he wanted 45 days off work. He noted that appellant was required to stand for six hours a day. Dr. Cham stated, "I d[o] n[o]t know if he needs 45 days, but that is his request." On March 11, 2008 he stated that appellant had pain in both knees. Dr. Cham noted that appellant complained that his left knee condition was a result of his right knee condition. He recommended light-duty work.

In a letter dated April 28, 2008, the Office allowed appellant an additional 30 days to submit a narrative medical report. In a May 28, 2008 report, Dr. Cham stated that appellant continued to experience right knee symptoms causing additional stress on the left knee and "igniting the previous asymptomatic arthritic condition." He stated, "If not for the right knee condition, it is unlikely that he would be putting the amount of loads on his left knee to cause aggravation or lightening up of the previous arthritic condition and making it symptomatic now." Dr. Cham opined that appellant's current left knee condition was work related and diagnosed arthritis.

By decision dated June 13, 2008, the Office denied appellant's claim for recurrence of disability or consequential injury finding that Dr. Cham's reports were not sufficient to establish his claim. It noted that appellant had engaged in nonfederal work duties beginning March 2006.

Appellant requested reconsideration on July 14, 2008. In a note dated June 25, 2008, Dr. Cham stated that he believed that appellant's current left knee condition was due to his right

knee injury. He did not see any evidence of loosening or other problem with his right total knee replacement. Dr. Cham stated that appellant could not continue to work as a cook. He advised that appellant was permanently disabled beginning June 25, 2008. On July 15, 2008 Dr. Cham found spontaneous swelling in the front of the tibia tubercle. He diagnosed mild patellar tendinitis.

By decision dated August 5, 2008, the Office denied modification of the June 13, 2008 decision noting that Dr. Cham did not address appellant's ability to work as an information clerk.

Appellant again requested reconsideration on August 19, 2008. He submitted notes dated August 18 and September 16, 2008 from Dr. Paul A. Jain, a general practitioner, who noted that appellant had a history of chronic bilateral knee pain with recurrent effusions in both knees. Dr. Jain recommended work restrictions of no standing longer than five minutes. He stated that appellant's left knee pain and subsequent osteoarthritis was due to overcompensation as a result of the right knee condition.

In notes dated September 15 and 16, 2008, Andrew T. Pennock, a Ph.D, reported slight swelling in the right knee.

In a November 25, 2008 decision, the Office denied modification of the June 13, 2008 decision finding that appellant had not submitted sufficient medical evidence to establish a recurrence of disability or a consequential injury.

Appellant requested reconsideration on December 5, 2008. In a report dated October 27, 2008, Dr. Michael P. Muldoon, a Board-certified orthopedic surgeon, noted appellant's history of right knee injury and his current employment as a cook. He stated that appellant's continued difficulties with his right knee were causing him to overcompensate and resulted in increasing symptoms in the left knee. Dr. Muldoon recommended additional diagnostic testing. On November 19, 2008 he found that appellant was totally disabled through January 1, 2009. A bone scan on November 26, 2008 demonstrated increased activity along the margins of the knee hardware. In a December 3, 2008 note, Dr. Muldoon opined that appellant had tibial component loosening and recommended additional surgery.

On November 20, 2008 appellant alleged that he had a recurrence of his right knee condition as well as a consequential left knee condition. Since his left knee condition developed he was diagnosed with hypertension and anxiety.

By decision dated January 27, 2009, the Office authorized revision of appellant's right knee surgery and accepted that appellant had sustained a recurrence of the right knee condition. It noted that he requested compensation for total disability for the periods February 18 through April 1, 2008 and June 21, 2008 through January 26, 2009 as well acceptance of the left knee condition and his diagnoses of hypertension and anxiety. The Office denied the consequential left knee, hypertension and anxiety conditions as related to appellant's employment injury. It authorized compensation from November 19, 2008 through January 17, 2009 and entered appellant on the periodic rolls beginning January 18, 2009.

Appellant requested reconsideration of the January 27, 2009 decision. Dr. Muldoon performed surgical revision of appellant's right total knee arthroplasty on March 13, 2009. He

submitted treatment notes following surgery addressing appellant's recovery. On April 15, 2009 Dr. Muldoon stated that appellant had difficulties with his total knee replacement since June 2008 and was first totally disabled in June 2008. Appellant resubmitted Dr. Cham's February 13, 2008 note as well as Dr. Muldoon's November 19, 2008 note.

In a June 5, 2009 decision, the Office denied appellant's requests for wage-loss compensation from February 18 through April 1, 2008 and June 1 through November 18, 2008. It found that the medical evidence did not establish that he was totally disabled for his position of information clerk, but rather his nonfederal employment as a cook. The Office stated that it had not accepted appellant's claimed recurrence of disability, but instead accepted the need for surgery and a period of disability leading up to that surgery.

Appellant requested reconsideration on June 17, 2009. He submitted medical evidence from Dr. Muldoon addressing his condition following his March 13, 2009 surgery. Appellant also submitted copies of x-ray reports which did not identify any specific problem with his knee hardware. On July 16, 2009 Dr. Jain stated that appellant's right knee condition had improved following surgery, but that he still experienced chronic left knee pain secondary to osteoarthritis.

By decision dated September 15, 2009, the Office denied appellant's request for consideration of the merits on the grounds that he failed to submit any relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

It is 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 which is attributable to the employee's own intentional conduct. It is well established that 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.¹

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.²

¹ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

² *Charles W. Downey*, 54 ECAB 421 (2003).

ANALYSIS -- ISSUE 1

Appellant alleged that he developed a consequential left knee condition as a result of his accepted right knee injury and total knee replacement in December 2003. On March 11, 2008 Dr. Cham, a Board-certified orthopedic surgeon, stated that appellant reported pain in both knees. He noted that appellant attributed his left knee pain to his right knee condition. Dr. Cham recommended light-duty work. On May 28 and June 25, 2008 he stated that appellant's right knee symptoms were causing additional stress on the left knee and "igniting the previous asymptomatic arthritic condition." Dr. Cham opined, "If not for the right knee condition, it is unlikely that he would be putting the amount of loads on his left knee to cause aggravation or lightening up of the previous arthritic condition and making it symptomatic now." He diagnosed arthritis and concluded that appellant's current left knee condition was work related. The Board finds that Dr. Cham's opinion on causal relationship is speculative. He failed to describe the nature of the right knee symptoms or explain how this caused additional loads on the left knee. Dr. Cham also failed to discuss appellant's private-sector employment as a cook and whether the six hours a day standing required by this position caused or contributed to the left knee condition. Without an accurate factual history and detailed medical findings, his report is not sufficient to meet appellant's burden of proof.

Dr. Muldoon, a Board-certified orthopedic surgeon, examined appellant on October 27, 2008, noted his history of right knee injury and his current employment as a cook. He stated that appellant's continued difficulties with his right knee were causing him to overcompensate and resulted in left knee symptoms. Dr. Muldoon noted appellant's private-sector employment and opined that his left knee condition was a consequence of the accepted employment injury; however, he did not fully describe appellant's specific job duties or address how the prior right knee arthropathy would contribute to appellant's left knee symptoms. He did not provide adequate medical reasoning explaining how he reached his stated conclusion other than referring to overcompensation. Without medical rationale, this report is not sufficient to establish appellant's claim.

Appellant did not submit sufficient medical evidence to establish that his hypertension or emotional condition is related to his accepted right knee condition. The question of causal relationship is a medical one and must be resolved by probative medical evidence.³ As appellant failed to submit any medical evidence, the Office properly denied this aspect of his claim.

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁴ Compensation for loss of wage-earning capacity is based upon loss of the capacity to

³ *A.D.*, 58 ECAB 149 (2006).

⁴ 5 U.S.C. § 8115(a); *K.R.*, 61 ECAB ____ (Docket No. 09-415, issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

earn and not on actual wages lost.⁵ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁶

Modification of a standing wage-earning capacity 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 erroneous.⁷ The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS -- ISSUE 2

The Office issued a formal wage-earning capacity determination on July 29, 2005 finding that appellant had the capacity to earning wages as an information clerk. Appellant has not alleged nor submitted evidence that this initial decision was in error. Furthermore, the Office has not alleged that he has been retrained or rehabilitated. Beginning on February 27, 2008, appellant alleged that he sustained a material change in the nature and extent of his injury-related right knee conditions rendering him totally disabled and warranting modification of the wage-earning capacity determination. As noted, appellant underwent a total right knee arthroplasty on December 3, 2003. He has the burden of establishing a change in this condition warranting modification of the wage-earning capacity determination.

On February 13, 2008 Dr. Cham noted that appellant believed his work required him to stand too much and that he wanted 45 days of total disability. He stated, "I d[o] n[o]t know if he needs 45 days, but that is his request." This report does not establish a material change in appellant's injury-related right knee condition. Dr. Cham did not provide a firm medical diagnosis or provide his own opinion that appellant was totally disabled, but instead relied on appellant's representation of disability. The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰ On March 11, 2008 Dr. Cham stated that appellant had pain to both knees. This report is not sufficient to establish a

⁵ *K.R.*, *supra* note 4; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁶ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁷ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

⁹ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁰ *Id.*

material change in appellant's accepted right knee condition as Dr. Cham did not provide a clear diagnosis. The Board has generally held that the diagnosis of "pain" does not constitute the basis for payment of compensation.¹¹

On June 25, 2008 Dr. Cham did not see any evidence of loosening or other problems with appellant's right total knee replacement, but stated that he could not continue to work as a cook. He indicated that appellant was totally disabled beginning June 25, 2008. Dr. Cham did not support any change in appellant's right knee condition, noting instead that appellant did not have a problem with his total knee replacement. Dr. Cham did not address appellant's ability to perform the duties of an information clerk finding instead that he could not work as a cook. On July 15, 2008 Dr. Cham diagnosed patellar tendinitis based on the physical finding of spontaneous swelling in the front of the tibia tubercle. He did not clearly identify the knee impacted by the swelling. These reports are not sufficient to establish a material change in appellant's accepted right knee condition.

Dr. Jain, a general practitioner, completed reports on August 18 and September 16, 2008 finding that appellant had a history of chronic bilateral knee pain with recurrent effusions in both knees. Dr. Pennock, a physician, reported slight swelling in the right knee on September 15 and 16, 2008. Although Drs. Jain and Pennock diagnosed recurrent effusions or swelling in the right knee, neither physician offered any explanation of how this condition caused a material change in appellant's right knee osteoarthritic condition. Moreover, the physicians did not address her capacity for work in the selected position. For these reasons, these reports are not sufficient to meet appellant's burden of proof to modify his wage-earning capacity determination.

On November 19, 2008 Dr. Muldoon found that appellant was totally disabled beginning that date. The Office authorized compensation for total disability based on this report. A subsequent bone scan dated November 26, 2008 established tibial component loosening.

On April 15, 2009 Dr. Muldoon stated that appellant had difficulties with his total knee replacement since June 2008 and was first totally disabled in June 2008. Although he offered an opinion that appellant's right knee rendered him totally disabled prior to November 19, 2008, he did not describe the findings on which he based this conclusion or offer sufficient medical reasoning in support of his opinion that the accepted material change in appellant's injury-related condition, the tibial component loosening, occurred in June 2008. These reports are not sufficient to establish that appellant's wage-earning capacity decision should have been modified prior to November 19, 2008, the date the Office reinstated total disability compensation.

The medical evidence in the record does not support a material change in the nature and extent of appellant's right knee condition prior to November 19, 2008. As such appellant is not entitled to additional compensation benefits prior to this date.

LEGAL PRECEDENT -- ISSUE 3

The Federal Employees' Compensation Act provides in section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or

¹¹ *Robert Broome*, 55 ECAB 339 (2004).

on application by the claimant.¹² Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that the Office erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by the Office; or includes relevant and pertinent new evidence not previously considered by the Office.¹³ Section 10.608 of the Office's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, the Office will deny the application for review without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 3

Appellant requested reconsideration of the Office's June 5, 2009 merit decision on June 17, 2009. In support of this request, he submitted additional medical evidence. Appellant submitted several reports from Dr. Muldoon, a Board-certified orthopedic surgeon, addressing his recovery from his March 13, 2009 surgery. As these reports do not address the outstanding issues before the Office, whether his claim should be expanded to include a left knee injury, hypertension and anxiety as a result of his February 28, 2001 employment-related right knee injury, these reports are not relevant to the issues of the case and are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant also submitted copies of x-ray reports dated August 18 and 20, 2008 which were not able to identify any specific problem with his knee hardware. These reports are not relevant to the central issue of appellant's claim. While the reports suggest that appellant had an ongoing medical condition, there is no discussion of either a consequential left knee injury or a period of disability due to his right knee condition. Therefore, these reports are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Dr. Jain, a general practitioner, completed a report on July 16, 2009 and stated that since appellant's knee replacement revision his right knee pain had improved, but that he still experienced chronic left knee pain secondary to osteoarthritis. This report does not offer an opinion regarding appellant's period of disability before November 18, 2008. The report does not address whether appellant's left knee pain is a consequential injury of his accepted right injury. As this report does not address the central issues in appellant's claim, it is not relevant evidence and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

The Board finds that the September 15, 2009 decision of the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit any relevant and pertinent new evidence in support of his request for consideration.

¹² 5 U.S.C. §§ 8101-8193, 8128(a).

¹³ 20 C.F.R. § 10.606.

¹⁴ *Id.* at § 10.608.

CONCLUSION

The Board finds that appellant has not submitted the necessary rationalized opinion evidence to establish a left knee consequential injury. The Board further finds that the Office properly declined to modify appellant's wage-earning capacity determination until November 19, 2008. Finally, the Board finds that appellant has not submitted relevant and pertinent new evidence not previously considered by the Office on June 17, 2009 and that the Office therefore properly declined to reopen his claim for consideration of the merits in its September 15, 2009 decision.

ORDER

IT IS HEREBY ORDERED THAT the September 15 and June 5, 2009 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: October 5, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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