United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 09-1969**
	)	**Issued: September 2, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Atwater, CA, Employer	)	

Appearances:
Brett E. Blumstein, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2009 appellant filed a timely appeal from the July 20, 2009 decision of the Office of Workers' Compensation Programs denying his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant sustained a left knee condition causally related to his federal employment.

On appeal, appellant contends that the statement of accepted facts did not provide a complete description of his work duties and that the Office referral physician's report was not sufficient to establish that his left knee condition was not causally related to his federal employment. Appellant's counsel argues that "at a minimum" a conflict exists in the medical opinion evidence.

FACTUAL HISTORY

On September 11, 2007 appellant, then a 47-year-old correctional officer, filed an occupational disease claim alleging that he developed left knee degenerative joint disease that he attributed to prolonged standing, walking, running, bending, twisting, stooping, lifting, carrying, and wearing a 50-pound duty belt with a radio and other equipment.[1] Effective December 22, 2007, he was granted medical disability retirement.

The Office provided the employer an opportunity to respond to the claim and by letter dated November 19, 2007, Bret Dorethy, a safety manager with the employer, disagreed with appellant's description of the lieutenant job duties. Mr. Dorethy noted that a lieutenant's position was largely administrative and not physically demanding unless a call for assistance was activated. Appellant's position required that he wear a duty belt with keys weighing from 2 to 3 pounds and boots that are approximately 2.5 pounds.[2] On occasion he had to physically subdue an aggressive inmate or respond to a request for assistance from staff. Certain employees, such as disturbance control team members and special weapons and tactics team members were required to be more physically fit than others. Appellant, as a lieutenant, supervised these teams in a command oversight capacity but he last taught physical training one and one half years previously. From August 6 through September 28, 2006 appellant was on a combination of continuation of pay, sick leave or annual leave. From September 29, 2006 to March 2, 2007 he was placed on light duty with medical restrictions for a previous injury claim (xxxxxx004). These restrictions included no running, climbing, bending or squatting, walking and standing limited to 15 minutes an hour, no lifting over 10 pounds and minimal inmate contact. According to the employer, after March 2, 2007, as there was no light duty, appellant was placed on leave without pay. Appellant filed a Form CA-7 (claim for compensation benefits) with the Office. The Office terminated his compensation for that claim on July 29, 2007.

By decision dated December 18, 2007, the Office denied appellant's occupational disease claim, finding that the evidence did not establish that his left knee condition was causally related to factors of his employment. Appellant requested a hearing before an Office hearing representative that was held on June 4, 2008. His testimony included a description of his work duties.

On February 26, 2008 Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, reviewed appellant's medical history and provided findings on physical examination. He diagnosed preexisting degenerative arthritis but noted there had been a material change in his condition. Appellant could no longer run following a July 8, 2006 work incident when he felt a crunch in his left knee while responding to a staff assistance call. Dr. Tauber reported that appellant "carried out extensive demanding duties, including standing, bending and twisting" and

[1] Appellant has a previous claim under OWCP File No. xxxxxx004 accepted for a traumatic left knee contusion and internal derangement/loose body on July 8, 2006. On November 6, 2008 the two files were combined. Effective June 29, 2007, the Office terminated his wage-loss compensation and medical benefits under OWCP File No. xxxxxx004. Appellant has preexisting left knee conditions, osteoarthritis, internal derangement, patellofemoral dysfunction and an acromioclavicular (ACL) tear for which he underwent surgery on October 26, 2001, April 27, 2004 and May 19, 2005.

[2] On October 31, 2008 Mr. Dorethy estimated that the weight of appellant's equipment was nine pounds.

carried a 50-pound belt. These duties in Dr. Tauber's opinion "at the very least contributed to [appellant's] degenerative disease to some extent. No honest physician can state that an individual who carries out walking, bending and stooping has a zero percent contribution to the development of arthritis of the knee." On June 3, 2008 Dr. Tauber clarified that appellant's duty belt weighed 15 pounds, not 50 pounds as stated in his February 26, 2008 report.

On May 8, 2008 Lieutenant K.B. White advised that he carried approximately 10 pounds of equipment while on duty. He was on his feet four hours of every eight-hour shift. On May 12, 2008 Lieutenant J.L. Shank estimated his equipment weight at 10 pounds. On May 22, 2008 Lieutenant Timothy Miller estimated his equipment at 10 to 12 pounds. He advised that a lieutenant's job involved standing and walking for several hours and, during an emergency, running to provide assistance.

In a September 17, 2008 decision, the Office hearing representative set aside the December 18, 2007 decision and remanded the case for further development. He directed the Office to refer appellant, together with a comprehensive statement of accepted facts (SOAF) and the medical evidence, to a Board-certified orthopedic surgeon for a reasoned opinion as to whether his work duties caused or contributed to his left knee condition.

An October 31, 2008 SOAF listed the correctional supervisor work duties as provided by appellant to Dr. Shaw on June 4, 2007. They included wearing a belt with 20 pounds of equipment and 10-pound work boots, prolonged standing and walking, infrequent running in emergency situations, occasional inmate takedowns during altercations, repetitive grasping, pushing, pulling, twisting, kneeling, squatting and lifting. Until March 14, 2007 appellant worked eight-hour shifts with occasional double shifts. The SOAF noted that the employing establishment disputed the weight of the duty belt and boots and advised that a lieutenant's job involved administrative duties primarily and was not physically demanding except during a call for assistance. The employing establishment stated that appellant was off work from August 6 to September 28, 2006 and then on light duty until March 2, 2007 when he was placed on temporary total disability because light-duty work was not available.

On November 18, 2008 Dr. Alice Martinson, a Board-certified orthopedic surgeon and an Office referral physician, reviewed appellant's medical history and provided findings on physical examination. She diagnosed bilateral patellofemoral arthritis. Appellant began his federal employment in 1989. In 2001 he was promoted to lieutenant and supervised the entire prison. Appellant made daily rounds to check on guards and inmates. He walked several miles a day and climbed several flights of stairs. In emergency situations such as inmate violence, appellant had to run variable distances. Appellant weighed 195 pounds and was 6 feet, 1 inch in height. While working at the employing establishment, he was morbidly obese, weighing 285 pounds at the time of his 2001 knee arthroscopy. He stopped work in April 2007 and weighed 335 pounds when he underwent gastric bypass surgery in September 2007. Appellant had well-healed arthroscopy portal scars on the anterior aspect of both knees. He lacked 20 degrees of full left knee extension. There was audible and palpable patellofemoral crepitus bilaterally with active and passive flexion and extension. Appellant had a mildly positive left anterior drawer sign in comparison to the right. He had one centimeter of left thigh atrophy. Knee circumferences were equal. There was no palpable effusion or increased local heat in either knee. Dr. Martinson opined that appellant's job duties as a corrections officer did not cause his left knee condition.

The occasional exertional weight bearing requirements may have produced temporary exacerbations of his symptoms. The primary cause of his chronic left knee pain was his long-standing morbid obesity. Following appellant's weight loss, total knee arthroplasty was not medically necessary. His bilateral patellofemoral arthritis was not related to his employment.

By decision dated January 7, 2009, the Office denied appellant's claim on the grounds that the weight of the medical the evidence, represented by the opinion of Dr. Martinson, established that his left knee condition was not causally related to factors of his employment.

In a February 3, 2009 report, Dr. Tauber noted that appellant's job required him to run and climb in pursuit of individuals. The pivoting and twisting involved in his job aggravated an arthritic knee. Dr. Tauber stated that appellant's knees were subject to significant stress from his work activities and this was a substantially aggravating factor of his underlying knee condition. He opined that appellant sustained a permanent aggravation of his preexisting degenerative arthritis as a result of his work activities.

On April 21, 2009 appellant requested reconsideration. He asserted that the October 31, 2008 SOAF did not list all of his work duties. It did not include his 1989 correctional officer position at a large facility which required extensive walking. Appellant performed searches of at least five inmate cells each shift and had to bend, stoop and crawl to search for illegal items. Once a day he responded to emergencies such as inmate altercations. Appellant had to run to the location, physically restrain inmates and carry uncooperative or injured inmates. When acting as a rear sally port officer, he conducted searches of vehicles entering the facility, including crawling underneath vehicles. In 1993 there was an increase in physical confrontations with inmates. In 1995 and 1997 there were riots. In 1997 a correction officer was murdered. From 1992 to 2007 appellant taught disturbance control to staff once a month. During training, staff physically restrained appellant and threw him to the ground. In 2001 appellant was promoted and transferred to a new facility. He installed bunks, carried mattresses, poured concrete, bolted lockers to walls and spread gravel. When appellant acted as an operations lieutenant, he walked up to seven hours of an eight-hour shift and performed administrative work for one hour. He contended that Dr. Tauber's report established a permanent aggravation of his left knee preexisting degenerative arthritis. Dr. Martinson did not note all of his work duties in her report. She noted only occasional exertional weight bearing requirements but appellant's weight bearing activity occurred six or more hours a day during most of his career. Dr. Martinson's report was of diminished probative value because it was not based on an accurate understanding of his work duties. Appellant contended that Dr. Martinson attributed the cause of his chronic knee pain to his long history of morbid obesity but failed to consider whether his work activities aggravated his left knee condition. He argued that Dr. Tauber's February 3, 2009 report should carry the weight of the medical opinion or create a conflict with the medical opinion of Dr. Martinson.

On April 8, 2009 the Office denied appellant's request for a review of the written record on the grounds that the request was not timely filed within 30 days on the January 7, 2009 decision. It exercised its discretion and determined that the issue could be equally well resolved through a reconsideration request and the submission of new medical evidence.[3]

[3] Appellant did not request Board review of the April 8, 2009 Office decision.

On July 20, 2009 the Office affirmed the January 7, 2009 decision.

LEGAL PRECEDENT

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[4] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on 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 employee.[5]

Section 8123 of the Federal Employees' Compensation 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 shall appoint a third physician who shall make an examination.[6]

ANALYSIS

The Board finds that this case is not in posture for a decision.

Dr. Martinson provided a history of appellant's federal duties. He began his federal employment in 1989. In 2001 appellant was promoted to lieutenant and supervised the entire prison. He made daily rounds to check on guards and inmates. Appellant walked several miles a day and climbed several flights of stairs. In emergency situations such as inmate violence, he had to run variable distances. Dr. Martinson opined that appellant's job duties as a corrections officer did not cause his left knee condition. He opined that appellant's previous morbid obesity, prior to his gastric bypass surgery, was the cause of his knee condition.

As the Office did not prepare a comprehensive statement of accepted facts, Dr. Martinson's opinion on causal relationship is not based on a complete and accurate factual background. Her description of appellant's job duties does not include many of the duties and physical requirements contained in the June 4, 2008 hearing transcript and in the hearing representative's September 17, 2008 decision. Because Dr. Martinson's report is not based on a

[4] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

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

[6] 5 U.S.C. § 8123.

complete and accurate factual background, her opinion on causal relationship is of diminished probative value.

Dr. Tauber, appellant's treating physician offered an opinion that appellant's running and climbing in pursuit of individuals, with the pivoting and twisting required, aggravated appellant's left knee condition. His report, like Dr. Martinson's, however is of reduced probative value because the Office has not prepared the comprehensive statement of accepted facts, as instructed by the Office hearing representative. A conflict in medical opinion evidence thus exists regarding the cause of appellant's left knee condition, but this conflict can only be resolved following preparation of a new statement of accepted facts.

The Board finds that the case must be remanded for the Office to prepare a detailed and comprehensive SOAF incorporating findings of fact regarding appellant's work duties for the different positions he held during his tenure at the employing establishment from 1989 to 2007. As required by Office procedures, the claims examiner should divide the statement of accepted facts into parts, identifying both work-related and nonwork-related elements labeled as follows: (1) Accepted events that are factors of employment; (2) Accepted events that are not factors of employment; (3) Incidents alleged which the Office finds did not occur.[7] Such findings are necessary because they provide a proper frame of reference for the physician offering an opinion on causal relationship.[8] On remand the Office should review appellant's written statements regarding his job duties, the transcript of the June 4, 2008 hearing and statements from the employing establishment and witnesses. It should prepare a thorough SOAF consistent with its procedure manual. Given the complexity of appellant's medical condition, other elements which should be included in the statement of accepted facts are appellant's prior medical history, medical treatment received, concurrent medical conditions and history of prior work injuries.[9] The Office should refer appellant, together with the new SOAF and medical evidence of record, for an impartial medical examination and a rationalized opinion on whether his left knee condition is causally related to factors of his federal employment. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should prepare a new SOAF and refer appellant for an impartial medical examination. After such further development as it deems necessary, it should issue an appropriate decision on his claim for a left knee condition.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.6 (September 2009).

[8] *See Abe E. Scott*, 45 ECAB 164 (1993); *Donald E. Ewals*, 51 ECAB 428 (2000).

[9] *Supra* note 7 at 2.809.6(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 20, 2009 is set aside and the case is remanded for action consistent with this decision.

Issued: September 2, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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