

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Plainfield, NJ, Employer**

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**Docket No. 10-1863
Issued: April 19, 2011**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2010 appellant filed a timely appeal from a January 27, 2010 Office of Workers' Compensation Programs' merit decision which denied his claim. He also appealed a June 16, 2010 decision of the Office which denied further merit review. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he developed a right knee condition while in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board.² In an April 7, 2009 decision, the Board set aside the Office decision dated May 19, 2008 and remanded the claim for further medical development. The Board instructed the Office to secure a reasoned medical opinion on the issue of whether appellant developed osteoarthritis of the right knee as a result of performing his employment duties. The facts and the circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.³

There was evidence submitted prior to the Board's decision relevant to the current appeal. In a January 29, 2007 report, Dr. Robert T. Goldman, a Board-certified orthopedic surgeon, treated appellant on October 17 and November 21, 2006 for right knee pain that was present for several years but became progressively worse. He noted x-ray findings and diagnosed severe right knee osteoarthritis. Dr. Goldman listed appellant's work as a letter carrier for 32 years in which he carried about 35 pounds of mail in a mailbag up to six hours per day. He found that appellant's repetitive use of the knee joint over years of employment, mechanical stress on the joint and his age all contributed to cartilage degeneration. Dr. Goldman opined that appellant's right knee osteoarthritis was accelerated and aggravated by his work and recommended a total knee replacement. On March 28, 2008 he opined that appellant's letter carrier job required him to put a tremendous amount of stress on his knees which increased his need for a knee replacement. Also submitted was a January 14, 2008 report from Dr. David Weiss, an osteopath, who noted appellant was a letter carrier since 1974 and was required to walk for extended periods and had right knee pain since 2000. Dr. Weiss diagnosed cumulative and repetitive trauma disorder of the right knee, aggravation of preexisting degenerative joint disease of the right knee, chondromalacia patella of the right knee and status post right total knee replacement. He opined that appellant's knee injury was work related.

On November 4, 2009 the Office referred appellant for a second opinion to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon. It provided Dr. Hutter with appellant's medical records, a statement of accepted facts and a detailed description of appellant's employment duties. In a November 20, 2009 report, Dr. Hutter noted examining appellant, reviewing the records and set forth a history of appellant's condition. He noted an essentially normal physical examination. Right knee examination revealed healed arthroscopic scars, no swelling or erythema, range of motion was 103 degrees, no medial or lateral joint line tenderness, anterior drawer and Lachman test were negative and no varus or valgus laxity. Dr. Hutter diagnosed status post right total knee replacement and status post left knee arthroscopy. He noted that appellant was back at work performing his full duties. Dr. Hutter found that appellant reached maximum medical improvement and was able to perform his full duties and required no further medical care.

² On November 29, 2006 appellant, then a 56-year-old letter carrier, filed an occupational disease claim alleging that he developed osteoarthritis of the right knee while walking, lifting, casing and standing at work. He became aware of his condition on September 27, 2006. Appellant stopped work on September 22, 2006 and did not return.

³ Docket No. 08-2009 (issued April 7, 2009).

In a letter dated December 8, 2009, the Office requested that Dr. Hutter clarify whether appellant's osteoarthritis of the right knee was work related. In a supplemental report dated December 15, 2009, Dr. Hutter opined that the development of osteoarthritis of the right knee was due to a natural aging and degenerative process and there was no direct cause between this condition and appellant's employment. He noted that the need for knee replacement surgery would have been necessary regardless of the employment activities.

In a decision dated January 27, 2010, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his right knee condition was caused by his employment duties.

On June 10, 2010 appellant requested reconsideration. He asserted that Dr. Hutter's report failed to provide adequate medical rationale in support of his opinion. Dr. Hutter did not discuss his job duties as a letter carrier or address whether the preexisting condition was aggravated or accelerated by his work duties. He requested to be referred to another specialist.

In a June 16, 2010 decision, the Office denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,⁴ including that he or she is an "employee" within the meaning of the Act⁵ and that she filed her claim within the applicable time limitation.⁶ The employee must also establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.⁷

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.⁸

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁵ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *See* 5 U.S.C. § 8101(1).

⁶ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

⁷ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

Section 8123 of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁹

ANALYSIS -- ISSUE 1

On November 29, 2006 appellant filed an occupational disease claim alleging that he developed osteoarthritis of the right knee while in the performance of duty. Following the Board's April 7, 2009 decision remanding the case for further medical development, the Office referred him to Dr. Hutter for a second opinion.

The Board finds that there is a conflict in medical opinion between Dr. Hutter, the Office referral physician, and Drs. Goldman and Weiss, appellant's treating physicians.

In reports dated November 20 and December 15, 2009, Dr. Hutter noted an essentially normal orthopedic examination and found that appellant was able to perform his full duties and no further medical care was required. He opined that the development of osteoarthritis of the right knee was due to the natural aging and degenerative process and not due to appellant's employment. Dr. Hutter stated that the need for knee replacement surgery would have been necessary regardless of employment activities. By contrast, in a January 29, 2007 report, Dr. Goldman opined that appellant's osteoarthritis of the right knee was accelerated and aggravated by his employment as a letter carrier and recommended a total knee replacement. Dr. Weiss, in a January 14, 2008 report, opined that appellant developed cumulative and repetitive trauma disorder of the right knee with aggravation of preexisting degenerative joint disease as a result of performing his work duties. Drs. Goldman and Weiss supported that the diagnosed osteoarthritis of the right knee was accelerated and aggravated by appellant's employment as a letter carrier, while Dr. Hutter found that the diagnosed osteoarthritis of the right knee was due to natural aging and degenerative process and not due to appellant's employment. The Board finds that a conflict in medical opinion has been created.

The case will be remanded for an impartial medical specialist to resolve the conflict in the medical opinions. On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate Board-certified physician to examine appellant and evaluate the evidence pursuant to 5 U.S.C. § 8123(a). Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision.¹⁰

CONCLUSION

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

⁹ 5 U.S.C. § 8123(a); *see also* *Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).

¹⁰ The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 27, 2010 is set aside and the case remanded to the Office for further action consistent with this decision.

Issued: April 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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