

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

E.R., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Lewis, WA, Employer**

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**Docket No. 10-1470
Issued: June 23, 2011**

Appearances:
Howard L. Graham, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2010 appellant, through her representative, filed a timely appeal from a December 22, 2009 merit decision of the Office of Workers' Compensation Programs. 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 this case.

ISSUE

The issue is whether appellant has established a recurrence of disability commencing June 12, 2008.

FACTUAL HISTORY

Appellant filed a traumatic injury claim (Form CA-1) alleging an injury in the performance of duty on April 23, 2002, when her right knee was struck while getting on a forklift. The Office accepted the claim for right knee contusion, right torn medial meniscus and

¹ 5 U.S.C. § 8101 *et seq.*

right knee degenerative joint disease. Appellant underwent arthroscopic right knee surgery on July 9, 2002 and May 6, 2003. On July 10, 2007 she underwent a unicompartment arthroplasty of the right knee. Appellant returned to a full-time, light-duty position on October 9, 2007.

On June 13, 2008 appellant filed a claim for compensation (Form CA-7) commencing June 12, 2008. In a treatment note dated June 12, 2008, Dr. W. Brandt Bede, the attending orthopedic surgeon, indicated that appellant was seen for a follow-up from her surgery, and he stated “no improvement has been noted over time. He reported that appellant had persistent pain during the day and at night, making it very difficult for her to continue working or be active. Dr. Bede provided results on examination, diagnosed status post unicompartment knee replacement and stated, “no work.” In a note dated June 24, 2008, he stated that appellant was taken off work due to increasing right knee pain, and at the present time she was unable to walk, sit or stand without discomfort.

In a report dated August 14, 2008, Dr. Bede stated that appellant was being treated for an employment-related torn medial meniscus and acceleration of osteoarthritic changes that were treated by knee replacement surgery. He stated that appellant had a tumultuous postoperative recovery and x-rays revealed advanced arthritic changes in the right knee. Dr. Bede opined that appellant was totally disabled.

By decision dated August 22, 2008, the Office denied the claim for compensation commencing June 12, 2008. It found that the medical evidence from Dr. Bede was not sufficient to establish the claim.

On September 19, 2008 appellant requested a hearing before an Office hearing representative. A hearing was held on January 14, 2009. Following the hearing, appellant submitted a July 30, 2008 report from Dr. Bede. In this report, Dr. Bede explained that she could not return to her date-of-injury position or her light-work position because she was significantly limited in sitting, standing, walking, ascending and descending stairs due to her ongoing knee pain. Appellant also submitted a February 13, 2009 report from Dr. Bede, who stated that since surgery appellant had increasing knee pain. He stated that x-rays of that date revealed loosening of the tibial compartment and appellant would be scheduled for removal of the unicompartmental knee replacement and conversion to a full total knee replacement. Dr. Bede further stated that appellant’s “time loss has been discontinued six to eight months ago. Retroactively it should be reinstated because her ongoing pain is most likely related to gradual and now obvious loosening of the tibial component.”

By decision dated April 28, 2009, an Office hearing representative remanded the case for further development. The hearing representative found the reports from Dr. Bede sufficient to require further development.

The Office referred the case to Dr. Clarence Fossier, an orthopedic surgeon selected as a second opinion physician. In a report dated July 14, 2009, Dr. Fossier reviewed the medical evidence of record.² In response to a question as to objective findings showing a worsening condition on June 12, 2008, he stated that appellant had undergone a right knee arthroplasty and

² There is no indication that Dr. Fossier examined appellant.

there was radiographic evidence of loosening of the tibial compartment. In response to a question regarding documented worsening for the light-duty job, Dr. Fossier responded, “Yes. The claimant is having increased pain with any increased activity which would have prevented her from working any condition [sic] regardless of the description.”

Appellant underwent a right total knee replacement on August 4, 2009, which was performed by Dr. Edward. A. Posuniak Jr., an osteopathic physician.

By decision dated August 5, 2009, the Office found that appellant had established a recurrence of disability commencing February 13, 2009. As to the claim for compensation from June 12, 2008 to February 12, 2009, it found the medical evidence did not establish a change in the employment-related condition.

Appellant again requested a hearing before an Office hearing representative. By decision dated November 3, 2009, the hearing representative remanded the case. The hearing representative found the Office should clarify Dr. Fossier’s opinion as it was unclear regarding disability commencing June 12, 2008.

In a report dated December 1, 2009, Dr. Fossier noted the August 14, 2008 report from Dr. Bede regarding arthritic changes and a September 10, 2008 note as to a failed arthroplasty. He stated that he would “consider this an ongoing process and not one that specifically started on June 12, 2008.” Dr. Fossier stated that there was no evidence, other than Dr. Bede’s opinion, that would have prevented appellant from continuing to work at her light-duty assignment. He also stated that there was no indication that any medication would have prevented appellant from working.

By decision dated December 22, 2009, the Office denied the claim for compensation from June 12, 2008 to February 12, 2009. It found the weight of the evidence was represented by Dr. Fossier.

LEGAL PRECEDENT

The Office’s regulations define the term recurrence of disability as follows:

“Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee’s physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.”³

³ 20 C.F.R. § 10.5(x).

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁴ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁵

The Act provides that, if there is a 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 the examination.⁶

The implementing regulations further explains however that, if the medical evidence supporting one conclusion is more consistent, logical and well reasoned than evidence supporting a contrary conclusion, the Office will use the conclusion that is supported by the weight of the medical evidence as the basis for awarding or denying further benefits.⁷

ANALYSIS

On appeal, appellant's representative alleges that, as appellant's right knee replacement of August 4, 2009 was employment related, her disability preceding the surgical procedure was causally related to the accepted employment injury.

In this case, Dr. Bede, appellant's attending orthopedic surgeon, since June 2002, opined that appellant was disabled due to an employment-related right knee condition as of June 12, 2008. He noted arthritic changes in the knee and stated that there was increased pain in the right knee which rendered appellant disabled due to restricted sitting, standing, walking and stair climbing. Dr. Bede also indicated that the loosening of the tibial compartment, demonstrated by x-rays dated February 13, 2009, would have been a gradual process, causing right knee pain.

Dr. Fossier, the second opinion physician, conducted a medical records review of appellant's knee injury and treatments. He neither physically examined appellant nor took an oral history from her. Dr. Fossier's report mainly consists of a recitation of Dr. Bede's extensive record of his treatment of appellant. In response to the Office's question as to whether there

⁴ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Maurissa Mack* 50 ECAB 498 (1999).

⁶ 5 U.S.C. § 8123.

⁷ 20 C.F.R. § 10.502 (1999)

were any objective findings to support a worsening of appellant's right knee condition that occurred specifically on June 12, 2008, he stated in his July 14, 2009 report that appellant had undergone a unicompartmental arthroplasty of her right knee, there was radiographic evidence of loosening of the tibial component, and that appellant was not doing well with arthritic changes of the patellofemoral and lateral compartments of the knee. Upon further questioning as to whether the documented worsening would have prevented appellant from working, Dr. Fossier stated that appellant was having increasing pain with any increased activity which would have prevented her from working at any position. When asked for clarification of his opinion as to whether appellant was disabled as of June 12, 2008, he reported on December 1, 2009 that only Dr. Bede's opinion supported a finding of disability as of that date. Dr. Fossier did not explain or offer any medical rationale as to why appellant was not disabled as of June 12, 2008, given that he stated in his July 14, 2009 report that appellant had a documented worsening of her condition as of June 12, 2008.

The Board has stated that factors which enter into the evaluation of the weight of the medical evidence are the opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion.⁸

When there are opposing reports of virtually equal weight and rationale, the case must be referred to a referee physician, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict.⁹ A referral to an impartial medical specialist, however, is not required if the medical evidence supporting one conclusion is more consistent, logical and well reasoned than evidence supporting a contrary conclusion. The Office's own regulations and long-standing Board precedent allow a finding of disability to be made on the weight of the medical evidence.¹⁰

The Board concludes that both Dr. Bede and Dr. Fossier support a finding that appellant's condition had worsened as of June 12, 2008, there is no conflict of medical opinion in this regard. Dr. Bede offered a well-rationalized opinion explaining why appellant's condition as of June 12, 2008 also caused total disability due to multiple work restrictions, based upon his examination and treatment of appellant, as well as the x-ray evidence. The Board concludes that Dr. Fossier's opinion that appellant was not disabled as of June 12, 2008 is of limited probative value as it was inconsistent with his previous opinion that appellant's condition had objectively worsened as of June 12, 2008 was not based upon a physical examination given the nature of the injury. The Board thus concludes that Dr. Bede's opinion that appellant's right knee worsened and caused disability as of June 12, 2008 is the weight of the medical opinion evidence and establishes appellant's claim of recurrence of disability.

⁸ See *Adrienne L. Wintrip*, 38 ECAB 373 (1987).

⁹ *William C. Bush*, 40 ECAB 1064 (1989).

¹⁰ *Supra* note 8.

CONCLUSION

The Board finds that appellant has established a recurrence of disability as of June 12, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2009 is reversed.

Issued: June 23, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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