

FACTUAL HISTORY

This is the third appeal before the Board in this case. By decision and order issued September 21, 2009,² the Board set aside a July 29, 2008 decision of OWCP denying appellant's claim for a recurrence of disability commencing June 24, 2005, the day he retired from federal employment. The Board remanded the case to OWCP to resolve a conflict of medical opinion between Dr. C. Scott Graham, an attending osteopathic physician Board-certified in family practice, and Dr. Stephen J. Thomas, a Board-certified orthopedic surgeon and second opinion examiner. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.³

During the pendency of the prior appeal, appellant submitted reports from Dr. Graham dated from August 27, 2008 to September 2, 2009 diagnosing chronic deep venous thrombosis in the lower extremities, Protein C deficiency, right tibular/fibular arthropathy and arthritis and edema in both legs.

On October 23, 2009 OWCP selected Dr. Timothy R. Borman, an osteopathic physician Board-certified in orthopedic surgery, as impartial medical examiner. It provided a list of questions concerning appellant's right knee condition. In a November 2, 2009 report, Dr. Borman reviewed the medical record and statement of accepted facts provided for his use. On examination, he noted an antalgic gait, ligamentous instability in the right knee and a positive anterior drawer sign. Dr. Borman diagnosed status-post total right knee arthroplasty in 2002 with a remote history of multiple right knee injuries and arthritis. He opined that appellant had an excellent result from the arthroplasty as he walked one to one-and-a-half miles three times and was able to care for the cows on his farm. Dr. Borman noted that according to the December 7, 2004 report of Dr. Thomas Fleming, a Board-certified orthopedic surgeon performing a schedule award evaluation, appellant's right knee was permanent and stationary as of May 17, 2004. He stated that the medical evidence did not demonstrate a worsening of his right knee condition after June 24, 2005. Dr. Borman found appellant able to perform his former light-duty job.

By decision dated November 20, 2009, OWCP denied appellant's claim for a recurrence of disability commencing June 24, 2005 based on Dr. Borman's opinion as the weight of the medical evidence. Appellant remained entitled to medical care for the accepted right knee conditions.

On December 16, 2009 appellant requested a telephonic oral hearing held on March 18, 2010. At the hearing, he asserted that the accepted thrombophlebitis worsened spontaneously on or about June 24, 2005, prompting him to retire from federal employment. Appellant contended that Dr. Borman did not consider whether his thrombophlebitis worsened in

² Docket No. 09-198 (issued September 21, 2009).

³ OWCP accepted that on July 25, 1978 appellant, then a 28-year-old forestry technician, sustained a right knee strain. It later accepted a strain of the right Achilles tendon, right knee instability, a possible torn right medial meniscus, post-traumatic osteoarthritis and septic arthritis of the right knee, total right knee arthroplasty and chronic thrombophlebitis with deep venous thrombosis of both legs.

June 2005. He submitted a December 2, 2009 report from Dr. Graham noting chronic edema in the right leg with pain in the right proximal tibia/fibia and chronic deep venous thrombosis.

By decision dated and finalized June 8, 2010, OWCP's hearing representative affirmed its November 20, 2009 decision, finding that appellant did not establish a recurrence of disability on June 24, 2005. The hearing representative accorded Dr. Borman's opinion the weight of the medical evidence, as his impartial report was well rationalized and based on a thorough review of the medical evidence and statement of accepted facts. He explained that the medical reports most contemporaneous to June 24, 2005 did not establish a worsening of the accepted medical conditions.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁴ 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 establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵ An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.⁶

Section 8123 of FECA 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.⁷ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

Where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from

⁴ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

⁵ *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁷ 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

⁸ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

the examiner for the purpose of correcting the defect in the original opinion.⁹ If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.¹⁰

ANALYSIS

OWCP appointed Dr. Borman, an osteopathic physician Board-certified in orthopedic surgery, to resolve a conflict of medical opinion regarding whether appellant sustained a recurrence of disability commencing June 24, 2005. Appellant claimed a worsening of both his accepted right knee condition and accepted thrombophlebitis. However, OWCP directed Dr. Borman to address only appellant's right knee conditions. The list of questions provided to Dr. Borman did not ask him to address whether the accepted thrombophlebitis had worsened.

Dr. Borman provided a detailed report discussing the accepted right knee conditions. He opined that appellant's knee was permanent and stationary as of May 17, 2004. However, Dr. Borman did not discuss whether the accepted thrombophlebitis worsened on June 24, 2005 as appellant claimed. His opinion therefore requires clarification.¹¹ The case will be remanded to OWCP to obtain a supplemental report from Dr. Borman regarding whether the accepted thrombophlebitis worsened on or after June 24, 2005. Following this and any other development OWCP deems necessary, OWCP will issue an appropriate decision in the case.

On appeal, appellant asserts that OWCP failed to consider whether the accepted thrombophlebitis worsened on June 24, 2005. He contended that OWCP obtained evidence only regarding the accepted right knee conditions. As stated, the case will be returned to OWCP for further development on the issue of whether appellant sustained a recurrence of disability due to worsening of the accepted thrombophlebitis.

CONCLUSION

The Board finds that OWCP failed to adequately develop the question of whether appellant's accepted thrombophlebitis worsened on or about June 25, 2005. The Board finds that clarification of this medical question is essential to a determination of whether appellant sustained a recurrence.

⁹ *Harry T. Mosier*, 49 ECAB 688 (1998).

¹⁰ *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹¹ *Harry T. Mosier*, *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 8, 2010 is set aside, and the case remanded for further development consistent with this decision and order.

Issued: September 16, 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