United States Department of Labor
Employees' Compensation Appeals Board

F.M., Appellant	)	
and	)	**Docket No. 12-590**
	)	**Issued: September 24, 2012**
U.S. NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2012 appellant filed a timely appeal from an August 16, 2011 decision of the Office of Workers' Compensation Programs (OWCP), which affirmed its decision dated December 23, 2010. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP met its burden of proof to establish that the employment-related temporary aggravation of osteoarthrosis of both knees resolved by April 30, 2004.

FACTUAL HISTORY

On January 10, 2007 appellant, then a 59-year-old shipfitter, filed an occupational disease claim alleging that he developed arthritis of the knees as a result of performing his work duties. He became aware of his condition and realized it was causally related to his employment on

[1] 5 U.S.C. §§ 8101-8193.

December 11, 2006. Appellant was separated from his employment on April 30, 2004 due to his inability to do his job due to his carpal tunnel syndrome.[2]

Appellant was treated by Dr. Michael McManus, a Board-certified orthopedic surgeon, on October 27, 2006 for severe secondary osteoarthritis of the medial compartment in both knees. He noted originally injuring his left knee in the 1970's when he stepped into a hole and had surgery in 1971. Appellant injured his right knee while working at a shipyard in 1976 and had surgery. He noted worsening pain in the 1980's, which he attributed to work as a shipfitter requiring repetitive climbing in confined spaces, kneeling and squatting. Appellant opined that his knee condition was the natural progression of osteoarthritis of the medial compartments due to bilateral open medial meniscectomies. On November 30, 2006 Dr. McManus diagnosed severe osteoarthritis, greatest at the medial compartment, bilateral knees and status post bilateral open medial meniscectomies, multifactorial, probably in part related to work activities as a shipfitter. On March 29, 2007 he noted that appellant was a shipfitter for 27 years and noted that his work duties included repetitive climbing, squatting and kneeling. Dr. McManus opined that these activities significantly contributed to the permanent severe secondary osteoarthritis of both knees.

In a decision dated March 29, 2007, OWCP denied appellant's claim for compensation.

Appellant requested an oral hearing which was held on July 19, 2007. He submitted additional medical evidence. In reports dated May 30 and September 11, 2007, Dr. McManus noted that appellant was a shipfitter for 27 years and had a history of bilateral open medial meniscectomies in the 1970's. He noted that a shipfitter performed repetitive climbing, squatting and kneeling and worked in confined spaces. Dr. McManus opined that these activities over years significantly contributed to the progression of degenerative disease in his knees.

In an October 15, 2007 decision, the hearing representative set aside the March 29, 2007 OWCP decision and remanded the case for further medical development. She directed OWCP to refer appellant to a second opinion physician to address the causal relationship between the diagnosed knee condition and the accepted work factors.

OWCP referred appellant to Dr. Richard E. Hall, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 29, 2007 report, Dr. Hall discussed appellant's work history. He noted a moderately obese man with scars over both knees, bilateral knee effusions, osteophytic spurring ridges on the medial compartment, patellofemoral crepitus, positive Lachman bilaterally and significant degenerative changes. Dr. Hall diagnosed bilateral knee degenerative joint disease osteoarthritis, narcotic habituation and upper extremity impairments. He noted the degenerative joint disease of the knees was ongoing. Dr. Hall opined that the contributing work factors were less likely the cause of the disease and that, more probable than not, it was the preexisting meniscal pathology resulting in a total meniscectomy which caused appellant to develop osteoarthritis of the knees.

[2] Appellant has an accepted occupational disease claim for bilateral carpal tunnel syndrome, claim number xxxxxx527. This claim is not before the Board on this appeal.

Appellant submitted reports from Dr. McManus, dated December 20, 2007 and February 8, 2008, who noted appellant's complaints of ongoing pain, swelling and crepitus of bilateral knees. Dr. McManus diagnosed severe secondary osteoarthritis of the medial compartment bilateral knees, work related.

In a decision dated May 16, 2008, OWCP denied appellant's claim for benefits. It determined that the weight of the medical evidence as determined by Dr. Hall did not establish that appellant's bilateral knee condition was related to the accepted work factors.

On May 28, 2008 appellant requested an oral hearing.

In an October 1, 2008 decision, an OWCP hearing representative set aside the May 16, 2008 decision and remanded the case for medical development. She found a conflict in medical opinion between Dr. Hall, who opined that appellant's preexisting knee condition and surgery made him susceptible to the development of arthritis and Dr. McManus, who opined that appellant's osteoarthritis of both knees was worsened by his employment duties.

On December 7, 2007 OWCP referred appellant to Dr. Donald Hubbard, a Board-certified orthopedic surgeon. In a January 23, 2009 report, Dr. Hubbard reviewed the record and examined appellant. He diagnosed by history bilateral knee joint injury, left early 1970 and right 1974 to 1975, with open bilateral knee arthrotomy and excision of medial menisci, cumulative trauma of the bilateral knee joint related to work activities of heavy lifting/carrying, prolonged kneeling/squatting and bilateral severe unicompartmental/medial joint space arthrosis. Dr. Hubbard opined that the condition of bilateral knee arthrosis was medically connected to work factors. He opined that, because appellant underwent a bilaterally complete medial meniscectomy in the 1970's, his knee joints were at increased risk for the development of bilateral medial compartment arthrosis. Dr. Hubbard indicated that appellant's bilateral knee arthrosis conditions were not at maximum medical improvement and the prognosis for his condition was poor without bilateral joint knee total knee arthroplasties. He could not state with probability that the knee conditions had been aggravated by employment activities at the shipyard based on the available medical evidence.

In a decision dated February 19, 2009, OWCP accepted appellant's claim for a resolved temporary aggravation of osteoarthrosis of the bilateral knee. On February 22, 2009 appellant requested an oral hearing.

In a decision dated June 4, 2009, an OWCP hearing representative set aside the February 19, 2009 decision and instructed OWCP to seek clarification from Dr. Hubbard regarding whether appellant had residuals of his accepted condition and whether the aggravation was temporary or permanent.

On July 10, 2009 OWCP requested Dr. Hubbard to provide clarification of his opinion. In a July 22, 2009 report, Dr. Hubbard noted that, based on the objective medical evidence, appellant's work duties as a shipfitter did not contribute to a worsening of his bilateral knee condition. He noted that knee joint arthritis routinely developed after menisci surgery which was performed prior to appellant's employment. Dr. Hubbard advised that physical activities did not

objectively aggravate individuals with meniscectomies but temporarily aggravated preexisting objective and subjective complaints in individuals with preexisting deterioration or pathology.

In an August 7, 2009 decision, OWCP again accepted appellant's claim for a temporary aggravation of osteoarthrosis of both knees.

On August 18, 2009 appellant requested an oral hearing.

In a decision dated November 3, 2009, an OWCP hearing representative vacated the August 7, 2009 decision. She found that Dr. Hubbard's July 22, 2009 report was contradictory and lacked sufficient rationale to resolve the medical conflict. The hearing representative noted that Dr. Hubbard originally opined that appellant's bilateral knee condition was connected to his work exposure but stated in his addendum that work activities did not contribute to his bilateral knee condition. OWCP was directed to refer appellant to a new impartial specialist.

On December 14, 2009 OWCP referred appellant to Dr. Lance N. Brigham, a Board-certified orthopedic surgeon. In a January 6, 2010 report, Dr. Brigham reviewed the medical record and examined appellant. He diagnosed osteoarthritis by history of both knees on a more probable than not basis secondary to the prior history of open medial meniscectomies from 1974 and 1975. Dr. Brigham noted a history of hypertension and industrially-related carpal tunnel release. Progressive osteoarthritis of the medial compartment of the knees was documented in x-rays from 2002 to 2007. Appellant had limited range of motion with flexion contracture of both knees, moderate medial instability of both knees and pain to palpation of the medial lateral joint of both knees. Dr. Brigham opined that appellant's condition was due to progressive arthritis of the medial and patellofemoral joints, which was more likely related to the history of bilateral open medial meniscectomies in 1974 and 1975. He opined that the bilateral arthritis was unrelated to any work conditions as appellant worked light duty from 1994 to 2004 using a cart to deliver mail. Appellant further reported that his symptoms did not begin until the mid 1980's and he did not seek medical care until the late 1980's to early 1990's. Dr. Brigham noted that complete meniscectomies in young individuals had a higher incidence of progressive arthritis. He noted that no preexisting condition was aggravated by work factors; however, with a natural progression of arthritis of the knees appellant had episodes of pain no matter what activities were considered. Dr. Brigham opined that the bilateral knee arthritis was not affected by employment as appellant performed light duty the last 10 years of his job by using a cart that protected his knees. X-ray review revealed arthritis in both knees in 2002 that progressed through 2007, which was a period appellant was not working. Dr. Brigham advised that appellant was a candidate for a total knee replacement which was not the result of work activities but the natural progression of arthritis of the medial compartment of both knees secondary to bilateral open medial meniscectomies. He noted that appellant could not return to work as a shipfitter but could return to work full time as a mail runner with restrictions, which were attributed to the bilateral medial compartment arthritis of the knees.

In a decision dated January 25, 2010, OWCP found that appellant's accepted temporary aggravation of osteoarthrosis of both knees resolved by April 30, 2004. It found that Dr. Brigham, while opining that work factors did not cause or aggravate the knee arthritis, he indicated that appellant would have had episodes of pain, resolving within a day or two, no matter what activities he performed. Based on this, OWCP found that the accepted condition

resolved by April 30, 2004, when appellant stopped work. Appellant requested an oral hearing which was held on June 24, 2010.

In a September 20, 2010 decision, the hearing representative set aside the January 25, 2010 decision and remanded the matter to OWCP for further medical development. She instructed OWCP to amend the statement of accepted facts to provide an affirmative finding on appellant's federal job duties, both the full and limited-duty positions and to provide the referee physician with definitions of direct causation, aggravation, acceleration and precipitation.

On November 15, 2010 OWCP requested that Dr. Brigham clarify his opinion and state whether he reviewed the statement of accepted facts and the definitions of causal relationship and address whether appellant's preexisting condition was aggravated by employment factors. In a November 22, 2010 supplemental report, Dr. Brigham reviewed the statement of accepted facts and the definitions of causal relationship. He advised that his previous opinion did not change. Dr. Brigham found that the preexisting bilateral arthritis of the medial compartments of both knees was not aggravated by appellant's employment activities.

In a decision dated December 23, 2010, OWCP found that appellant's temporary aggravation of osteoarthrosis of the bilateral knees resolved by April 30, 2004. Appellant requested an oral hearing which was held on May 25, 2010.

In a decision dated August 16, 2011, an OWCP hearing representative affirmed OWCP's decision dated December 23, 2010.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] Once OWCP accepts a claim it has the burden of justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.[4] The fact that OWCP accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on OWCP to demonstrate an absence of employment-related disability or residuals in the period subsequent to the date of termination or modification.[5]

Section 8123(a) 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 evaluation.[6] In situations where there exist opposing

[3] 5 U.S.C. § 8102(a).

[4] *D.M.*, Docket No. 10-857 (issued January 3, 2011); *Edwin Lester*, 34 ECAB 1807 (1983).

[5] *See Elsie L. Price*, 54 ECAB 734, 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

[6] 5 U.S.C. § 8123(a).

medical reports of virtually equal weight and rationale and the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[7] When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.[8] However, when the impartial specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to another impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[9]

ANALYSIS

OWCP accepted a temporary aggravation of osteoarthrosis of the bilateral knees that resolved by April 30, 2004. As noted, its acceptance of a claim for a specified period does not shift the burden of proof to the claimant. It is OWCP's burden to establish that appellant did not have residuals from the accepted injury. It based its decision to terminate benefits on Dr. Brigham's reports. The Board finds that OWCP properly terminated benefits.

The initial medical conflict between the opinions of Dr. McManus, appellant's treating physician, and the second opinion physician, Dr. Hall, with regard to whether appellant's osteoarthritis of both knees was aggravated by his employment duties. Appellant saw Dr. Hubbard to resolve the medical conflict. However, Dr. Hubbard's July 22, 2009 report was contradictory and lacked rationale so appellant was properly referred to a second impartial medical specialist, Dr. Brigham, for a new impartial medical examination.[10]

Dr. Brigham conducted an impartial medical examination and issued reports dated January 6 and November 22, 2010. In his January 6, 2010 report, he diagnosed osteoarthritis of the bilateral knees secondary to prior history of open medial meniscectomies from 1974 and 1975. Dr. Brigham noted that appellant's bilateral knee condition was due to progressive arthritis of the medial and patellofemoral, which was most likely related to the bilateral open medial meniscectomies in 1974 and 1975. He opined that the bilateral arthritis was unrelated to any work conditions as appellant worked light duty from 1994 to 2004 using a cart to deliver mail which protected his knees. Dr. Brigham noted that appellant's preexisting condition was not aggravated by employment factors but advised that those with a natural progression of arthritis of the knees will have temporary episodes of pain with activity that would resolve within a day or two. He opined that the bilateral knee arthritis was not caused by

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(3)(b) (March 1994, October 1995 and May 2003), citing *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

[8] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Rayon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[9] *R.G.*, Docket No. 11-79 (September 9, 2011); *Nancy Keenan*, 56 ECAB 687 (2005).

[10] *See supra* notes 8 and 9.

his employment. Dr. Brigham indicated that appellant was a candidate for total knee replacements but the surgery was not due to work activities but the natural progression of arthritis that was secondary to bilateral open medial meniscectomies. He noted that appellant could work full time with restrictions that were attributed to the bilateral medial compartment arthritis of the knees. In a supplemental report dated November 22, 2010, Dr. Brigham reviewed the revised statement of accepted facts and advised that his previous opinion did not change. He opined that the preexisting bilateral arthritis of the medial compartments of the knees was not aggravated by appellant's employment.

Accordingly, OWCP's finding that appellant's temporary aggravation of osteoarthrosis of his knees resolved by the time he stopped work, April 30, 2004, is supported by the well-rationalized medical opinion of Dr. Brigham, whose conclusion that appellant no longer had any work-related residuals was supported by his examination of appellant, his review of the record and appellant's work history.[11]

On appeal, appellant asserts that the accepted temporary aggravation of osteoarthrosis of the bilateral knees did not resolve April 30, 2004 and contends that Dr. Brigham's opinion was inaccurate and insufficient to resolve the medical conflict. As noted, Dr. Brigham's opinion is supported by his review of appellant's history, evaluation of medical evidence and examination findings. He reviewed appellant's history and, as noted above, demonstrated an awareness of the work injury. Dr. Brigham extensively reviewed the medical evidence and the statement of accepted facts dated November 15, 2010. He provided findings on examination and noted a review of the diagnostic testing in support of his conclusion. Dr. Brigham found no objective basis on which to attribute any continuing residuals of appellant's employment. His opinion establishes that appellant's work-related condition resolved.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to establish that the employment-related temporary aggravation of degenerative disc disease had resolved.

[11] *Richard O'Brien*, 53 ECAB 234 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 16, 2011 is hereby affirmed.

Issued: September 24, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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