

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

T.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL,
Philadelphia, PA, Employer**

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**Docket No. 13-206
Issued: April 8, 2013**

Appearances:

Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2012 appellant, through his attorney, filed a timely appeal from an October 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his bilateral knee condition was causally related to factors of his federal employment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 29, 2009 appellant, then a 54-year-old housekeeper, filed an occupational disease claim alleging that he sustained an aggravation of his preexisting degenerative joint disease and bilateral meniscus tears as a result of repetitive job activities.²

In a January 27, 2009 statement, appellant indicated that he became aware of pain in both knees on March 24, 2006. He stated that his job activities from 2000 to 2005 included a variety of sanitation duties in the radiology department, including sweeping, scrubbing, mopping, polishing floors, vacuuming and shampooing carpets and cleaning fixtures. Appellant used heavy duty commercial-type power equipment and cleaned and maintained x-ray rooms, offices, utility rooms and 10 bathrooms daily. He wiped down beds, washed walls and ceilings, cleaned lights and lifted trash, which sometimes contained discarded books weighing up to 40 pounds frequently and 50 pounds occasionally. Appellant also lifted buckets of water and pushed and pulled carts containing cleaning supplies and bathroom supplies. In performing these tasks, he pushed, pulled, walked, bent, stooped, crouched and lifted. All of his work was done while standing or walking.

In a letter dated February 9, 2009, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him to provide additional factual and medical evidence, including a physician's report with a diagnosis and an opinion explaining the causal relationship between his employment activities and the diagnosed conditions.

The employing establishment controverted the claim, stating that appellant was on light duty at the time of his disability retirement in 2008.

Appellant submitted an August 18, 2008 report from Dr. Hari Bezwada, a Board-certified orthopedic surgeon, who noted a prior history of osteoarthritis of the knees. Dr. Bezwada opined that appellant was totally permanently disabled and required bilateral knee arthroplasties.

In a report dated December 8, 2008, Dr. Richard Zamarin, a Board-certified orthopedic surgeon, reviewed a history of injury, stating that appellant began experiencing knee pain in 2006. He noted that appellant worked full duty until he broke his right hand in 2005, when he was placed on light duty. Examination of both knees revealed mild genu varus deformities.

On the right knee, range of motion was 0 to 100 degrees, with tenderness along the medial joint line. Examination of the left knee revealed range of motion of 0 to 110 degrees with crepitus. In both knees, his distal pulses were palpable; there was tenderness along the medial joint line; there was no ligamentous laxity; there was crepitus with range of motion and there was a minimal effusion.

A July 15, 2008 x-ray of the knees revealed severe medial compartmental degenerative disease with lateral subluxation of the tibia relative to the femur, as well as mild-to-moderate

² Appellant's prior cases include an April 25, 2005 claim for contact dermatitis (File No. xxxxxx168); a December 13, 2005 claim for bilateral carpal tunnel syndrome (File No. xxxxxx081); and a December 2, 2008 claim for right hand fracture (File No. xxxxxx532).

degenerative changes in the lateral compartment and patellofemoral joint. Dr. Zamarin reviewed appellant's work activities as described in his January 27, 2009 statement, noting the repetitive sanitation duties, which included sweeping, scrubbing, mopping, polishing floors, vacuuming and shampooing carpets, and cleaning fixtures, as well as using heavy duty commercial-type power equipment, wiping down beds, washing walls and ceilings, lifting buckets of water and trash, which sometimes contains discarded books weighing up to 40 pounds frequently and 50 pounds occasionally, and pushing and pulling carts containing cleaning and bathroom supplies. Appellant's activities involved substantial pushing, pulling, standing, walking, bending and stooping. Dr. Zamarin noted that appellant bent to dust the bottom of the x-ray tables, crouched to clean the bathrooms and used to get on his knees to do baseboards until 2005, when he was excused from that task.

A review of a July 10, 2008 magnetic resonance imaging (MRI) scan of the right knee revealed severe medial joint space degenerative joint disease with chondral loss and associated subchondral edematous change. There were multiple loose bodies, an abnormal medial meniscus with a complex tear and joint effusion. A July 10, 2008 MRI scan of the left knee showed severe medial joint space degenerative joint disease, a meniscal extrusion, a degenerative complex posterior horn tear of the medial meniscus and a Baker's cyst. A July 15, 2008 x-ray report showed marked degenerative disease in both knees; a September 26, 2008 x-ray of the knees showed severe end-stage degenerative joint disease tricompartmental most significant at the medial compartments. Dr. Zamarin opined, based upon a reasonable degree of medical certainty, that appellant had severe degenerative joint disease in both knees, which was aggravated by the work activity, such as constant standing and lifting. He explained that, although his arthritis was preexisting, it was aggravated by these work-related activities.

In a report dated May 4, 2009, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and a district medical adviser, opined that the medical evidence did not sufficiently support that appellant's work duties aggravated his degenerative joint disease of the torn menisci of both knees. He explained that x-rays revealed that appellant's severe osteoarthritis was a preexisting condition and not related to a work injury. Additionally, Dr. Berman found that Dr. Zamarin's report was not well rationalized.

By decision dated May 4, 2009, OWCP denied appellant's claim on the grounds that the evidence failed to establish a causal relationship between his employment activities and bilateral knee condition.

On May 7, 2009 appellant, through his representative, requested a telephone hearing.

By decision dated August 14, 2009, an OWCP hearing representative set aside the May 4, 2009 decision and remanded the case for further development. Finding that appellant had presented *prima facie* evidence of a causal relationship, he directed OWCP to prepare an amended statement of accepted facts (SOAF) and to refer the case for a second opinion examination.

On remand, OWCP referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for an opinion as to whether his knee condition was caused or aggravated by his employment duties. In a September 18, 2009 report, Dr. Draper provided examination findings

and diagnosed severe osteoarthritis of the knees, noncompartmental, and varus deformities of both knees associated the more media joint osteophyte narrowing. He opined that appellant's osteoarthritis was not causally related to his job, but rather developed due to his excessive weight and the aging process. Dr. Draper stated that the arthritis was preexisting and progressive and was an ordinary disease of life, unrelated to employment. In an addendum report dated November 12, 2009, he reviewed a March 24, 2006 x-ray, which he stated confirmed his prior opinion. Dr. Draper reiterated that appellant's osteoarthritis was preexisting and was not causally related to "the on-the-job accident dated March 24, 2006."

By decision dated December 7, 2009, OWCP denied appellant claim based upon Dr. Draper's second opinion reports, which constituted the weight of the medical evidence.

On December 11, 2009 appellant, through counsel, requested a telephone conference.

By decision dated February 24, 2010, an OWCP hearing representative set aside the December 7, 2009 decision and remanded the case for further development. He found that Dr. Draper had not provided sufficient rationale for his conclusion that employment factors had not aggravated appellant's knee condition and incorrectly stated that appellant had experienced an identifiable injury on March 24, 2006, rather than a continuing series of repetitive work activities. Additionally, Dr. Draper's opinion was based on an inaccurate statement of facts. The case was remanded with instructions for OWCP to prepare a revised SOAF and to obtain a rationalized report from Dr. Draper as to whether appellant's work activities aggravated his knee condition.

On remand, OWCP asked Dr. Draper to clarify his opinion on the development of osteoarthritis and provide rationale for his conclusion that appellant's condition was not aggravated by his employment activities.

On April 28, 2010 Dr. Draper responded that he understood clearly that appellant did not have a specific traumatic date of injury and had reported his complaint on the date of loss as March 24, 2006. He reiterated the diagnosis of osteoarthritis of both knees, tricompartmental. Dr. Draper stated that, although osteoarthritis of the knees is not caused by standing and walking, standing and walking can aggravate preexisting osteoarthritis of knees, especially when the patient is 80 pounds overweight, as with appellant. He indicated that varus deformities of appellant's knees developed because the patient had medial joint space narrowing more than lateral joint space narrowing.

Dr. Draper stated that there was no one specific cause of osteoarthritis of the knees. A patient can develop osteoarthritis associated with trauma, to include fractures of the articular surface of the joint total meniscectomy or marked congenital varus deformity of the knees. Dr. Draper stated, however, that he had no explanation as to why appellant developed osteoarthritis of the knees, bilaterally. He stated that it was "certainly conceivable that standing and walking and associated with this obesity could aggravate the osteoarthritis."

In a decision dated May 17, 2010, OWCP denied appellant's claim, finding that the evidence failed to establish a causal relationship between the diagnosed knee condition and appellant's work activities.

On May 19, 2010 appellant, through his representative, requested a telephone hearing. At the August 16, 2010 hearing, counsel argued that Dr. Draper's April 28, 2010 report actually supported appellant's claim.

In a decision dated November 23, 2010, an OWCP hearing representative set aside the May 17, 2010 decision and remanded the case for further development. The representative directed OWCP to obtain a new second opinion report with a specific diagnosis and a rationalized opinion as to whether appellant's identified employment duties caused or aggravated his diagnosed condition.

On remand, OWCP referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether there was a causal relationship between appellant's bilateral knee condition and factors of employment. In a report dated March 29, 2011, Dr. Lee provided a history of injury reflecting that appellant began to feel pain in both knees in 2005, but was doing limited-duty work with a one-handed job assignment at that time. On March 24, 2006 x-rays revealed arthritis of both knees. Examination of both knees in the supine position reveals an approximate 10-degree genu varus deformity and very noticeable periarticular thickening and marginal osteophytes around the joint bilaterally. Range of motion of both knees was limited from 10/110 degrees bilaterally compared with the normally expected 0/140 degrees. Range of motion was painful, especially with the extremes of flexion. Crepitus and tenderness were present on palpation of the patella. There was marked tenderness of the joint line, especially the medial joint space. Dr. Lee diagnosed advanced osteoarthritis of both knees, which he indicated had developed long before 2006 and continued to progress as a normal aging condition. He noted that there were some predisposing genetic factors, including his overweight condition, that would be associated with the advanced degenerative joint disease; however, that there was no evidence that a work-related condition caused or exacerbated the osteoarthritis or degenerative joint disease of both knees. Dr. Lee opined that appellant's current disability was "not due to an occupational condition of March 24, 2006."

In a decision dated May 20, 2011, OWCP denied appellant's claim, finding that Dr. Lee's report represented the weight of the medical evidence.

On May 26, 2011 appellant, through counsel requested a telephonic hearing. At the September 16, 2011 hearing, counsel argued that Dr. Lee reported an inaccurate history, noting that appellant worked in a one-handed light-duty job for only a few weeks before his retirement. He also contended that Dr. Lee did not address appellant's job duties or provide any rationale for his opinion.

By decision dated December 12, 2011, an OWCP hearing representative set aside the May 20, 2011 decision and remanded the case for further development. OWCP was directed to prepare a new SOAF to include accepted employment activities as described by appellant. The hearing representative found that Dr. Lee's report was not sufficiently rationalized and was based on an inaccurate and incomplete SOAF.

On remand, OWCP prepared a new SOAF and requested a supplemental report from Dr. Lee, who was asked to provide additional rationale regarding the issue of causal relationship based upon the revised statement of accepted facts. In a February 23, 2012 report, Dr. Lee

diagnosed advanced osteoarthritis or degenerative joint disease of both knees. Examination of both knees showed marginal osteophytes palpable over the medial joint line with noticeable periarticular thickening. Range of motion is 0/110 bilaterally, and there was marked tenderness and crepitus on palpation of the patella. McMurray maneuvers and Lachman tests were unremarkable with the exception of pain with joint motion. There were no signs of any instability of the collateral and cruciate ligaments and no palpable masses in the popliteal space. Both quadriceps and infrapatellar tendons were normal and measurement of the circumference of both thighs and knees was equal. There was no local tenderness or swelling of the calf and the circumference of both calves was also equal. Regarding the issue of causal relationship, Dr. Lee stated:

“As I indicated at the time of my previous examination, the arthritis of both knees is not the result of any job activities or any on-the-job injury, but rather, is representative of ongoing wear and tear and the aging condition. Obviously, this arthritis is severe enough that he is disabled, but this is not due to any work-related injury.”

In a March 6, 2012 addendum report, Dr. Lee stated:

“In my opinion, [appellant] does not have any medical evidence to support an aggravation of his underlying condition of advanced arthritis of both knees. Furthermore, his job activities did not accelerate any process of degeneration of the knee joint since there is no medical evidence for any trauma -- or injury -- induced acceleration or aggravation of his underlying condition of advanced osteoarthritis of both knees. Although individual jobs can have certain risks with regard to the body, there is no such evidence for any risk involved in this case.”

By decision dated April 11, 2012, OWCP denied appellant’s claim based on Dr. Lee’s medical opinion. The claims examiner found that appellant failed to establish that his diagnosed knee condition was caused or aggravated by the accepted employment activities.

On April 18, 2012 appellant, through his attorney, requested a telephone hearing. At the July 16, 2012 hearing, counsel argued that Dr. Lee failed to discuss appellant’s job duties and provided no rationale for his opinion. Therefore, he had failed to comply with OWCP’s directive.

By decision dated October 31, 2012, an OWCP hearing representative affirmed the April 11, 2012 decision, finding that Dr. Zamarin’s December 8, 2008 report was insufficient to establish a causal relationship between the diagnosed knee condition and factors of employment. He found that, although Dr. Lee did not provide extensive medical rationale to support his medical opinion, he did provide a clear, unequivocal and consistent opinion supporting that appellant’s degenerative condition was not work related.

LEGAL PRECEDENT

Section 10.5(q) of OWCP’s regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or work

shift.³ To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) medical evidence establishing the presence or existence of a condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the employee were the proximate cause of the condition or illness, for which compensation is claimed or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁴

In order to establish causal relationship, a claimant must submit rationalized medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between an employee's diagnosed conditions and the implicated employment factors.⁵ 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 conditions and the specific employment factors identified by the employee.

Section 8123(a) of FECA provides in pertinent part 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 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.⁷

ANALYSIS

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion.

Appellant filed an occupational disease claim alleging that he sustained an aggravation of preexisting degenerative joint disease and bilateral meniscus tears as a result of repetitive job activities. In his December 8, 2008 report, Dr. Zamarin provided detailed examination findings and diagnosed severe degenerative joint disease in both knees. After describing in detail appellant's description of his employment activities, he opined that, based upon a reasonable degree of medical certainty, appellant's preexisting diagnosed condition was aggravated by the work activities.

³ 20 C.F.R. § 10.5(q).

⁴ *D.D.*, 57 ECAB 734 (2006); *Donna L. Mims*, 53 ECAB 730 (2002).

⁵ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *G.G.*, 58 ECAB 389 (2007); *David Apgar*, 57 ECAB 137 (2005); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ 5 U.S.C. § 8123(a).

⁷ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

After OWCP initially denied appellant's claim, a hearing representative remanded the case for further development and referral to a second opinion physician to Dr. Draper but in a November 23, 2011 decision, an OWCP hearing representative remanded the case to obtain a new second opinion report as the reports of Dr. Draper did not sufficiently address causal relation.

On remand, OWCP referred appellant to Dr. Lee for an examination and an opinion as to whether there was a causal relationship between his diagnosed knee condition and the identified factors of employment. In his March 29, 2011 report, Dr. Lee provided examination findings and a history of injury. He diagnosed preexisting advanced osteoarthritis of both knees. Dr. Lee opined that there was no evidence that a work-related condition caused or exacerbated appellant's condition and that his current disability was "not due to an occupational condition of March 24, 2006.

In a February 23 and March 6, 2012 supplemental reports, Dr. Lee diagnosed advanced osteoarthritis or degenerative joint disease of both knees and reiterated his opinion that the diagnosed condition was not caused or aggravated by any job activities, but rather was due to wear and tear and the aging condition.

The Board finds that there is an unresolved conflict of medical opinion evidence between Dr. Zamarin and Dr. Lee regarding whether appellant's knee condition is causally related to his accepted employment activities.

On remand, OWCP should refer appellant, a statement of accepted facts and a list of specific questions to a qualified expert to resolve the existing conflict. After this and such other development as OWCP deems necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict of medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: April 8, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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