

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

J.G., Appellant)	
)	
and)	Docket No. 13-965
)	Issued: December 11, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellmawr, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, 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 March 14, 2013 appellant, through his attorney, filed a timely appeal from a January 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his consequential injury claim.¹ Pursuant to Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained a right knee condition for which surgery was warranted as a consequence of his May 16, 2008 employment injuries.

¹ The record also contains a September 28, 2012 merit decision of OWCP regarding a schedule award, but appellant has not appealed from this decision. Thus, it is not the subject of this Board appeal. See 20 C.F.R. § 501.3.

² 5 U.S.C. § 8101 *et seq.*

On appeal, counsel for appellant contends that the medical report of the impartial medical specialist is not entitled to the weight of medical opinion evidence. Further, Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon, was not properly selected under the Physicians Directory System (PDS) as there was no screenshot image of his actual selection.

FACTUAL HISTORY

OWCP accepted that on May 16, 2008 appellant, then a 41-year-old driver instructor, sustained a medial meniscus tear of the left knee as a result of a fall at work. It authorized arthroscopic left knee surgery.³ OWCP accepted that appellant sustained a recurrence of disability as of March 12, 2009 due to his authorized arthroscopic left knee surgery on that date. Appellant returned to part-time limited-duty work on July 8, 2010 and to full-time limited-duty work on September 14, 2010. On September 15, 2011 he was placed on administrative leave until a fraud investigation was completed by the employing establishment's inspector general office.⁴

By letter dated October 8, 2010, appellant, through his attorney, requested that OWCP accept his claim of major depression. He submitted medical reports dated October 4, 2010 and February 22, 2011 from Samuel A. Bobrow, Ph.D., a clinical psychologist, who advised that appellant, had a single episode of severe major depression that was a direct result of the ongoing pain and disability resulting from his May 16, 2008 employment injury.

By letter dated May 24, 2011, counsel requested that OWCP accept his claim for a right knee condition. He submitted reports dated October 1 to December 14, 2010 from Dr. Laura E. Ross, a Board-certified orthopedic surgeon, who listed findings on physical examination and diagnosed, internal derangement of the right knee with probable mild arthrosis and medial meniscus tear with mild degenerative joint disease secondary to left knee internal derangement and an altered gait. Dr. Ross recommended arthroscopic right knee surgery. She advised that appellant was walking with a severe limp for one year due to his left knee problem.

In an October 6, 2010 report, Dr. George J. Broder, a Board-certified radiologist, advised that an x-ray of appellant's right knee showed minimal degenerative changes.

By letters dated June 17, 2011, OWCP referred appellant for a second opinion examination, together with a statement of accepted facts and the medical record, to Dr. Joseph W. Slap, a Board-certified psychiatrist, and Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon.

³ In a prior appeal regarding appellant's schedule award claim assigned OWCP File No. xxxxxx668, the Board, in a September 27, 2010 decision, affirmed a June 11, 2009 OWCP decision, finding that he had no more than 24 percent impairment of the left upper extremity, for which he received a schedule award. Docket No. 09-2259 (issued September 27, 2010).

⁴ On February 23, 2012 the Office of Personnel Management approved appellant's disability retirement. Appellant separated from the employing establishment effective March 1, 2012 as he was totally disabled for useful and efficient service in his position.

In a July 15, 2011 report, Dr. Draper described the May 16, 2008 employment injury, appellant's medical treatment and social and family backgrounds. He reviewed the medical record and a surveillance video⁵ from the employing establishment and listed findings on physical examination. Dr. Draper diagnosed a torn medial meniscus and osteoarthritis of the left knee for which appellant was status post March 12, 2009 arthroscopic left knee surgery. Appellant had right cubital tunnel syndrome and right carpal tunnel syndrome. He was status post right ulnar nerve transposition, neuroplasty and right carpal tunnel release which were performed on October 20, 2009. Appellant had unrelated conditions of osteoarthritis and degenerative tears of the medial and lateral meniscus of the right knee as demonstrated by a magnetic resonance imaging (MRI) scan, due to osteoarthritis and not the May 16, 2008 employment injury. He stated that the claimed antalgic gait or limping did not cause the torn medial and lateral menisci. Dr. Draper related that the surveillance video did not actually demonstrate antalgic gait according to the claims examiner's November 5, 2010 report.⁶ The tears described in the right knee medial and lateral meniscus were typical of degenerative tears of the menisci due to osteoarthritis of the knee. Dr. Draper disagreed with Dr. Ross's opinion that the proposed right knee surgery was secondary to a severely altered gait caused by the left knee work injury. He concluded that appellant could perform regular full-duty work.

In a July 19, 2011 report, Dr. Slap reviewed a history of the May 16, 2008 employment injury and appellant's medical treatment. He listed findings on mental examination and diagnosed, a single episode of severe major depression. Dr. Slap advised that this condition was directly caused by the May 16, 2008 employment injury.

In an August 25, 2011 letter, counsel contended that there was a conflict in medical opinion between Dr. Ross and Dr. Draper.

By letter dated September 8, 2011, OWCP accepted appellant's claim for right carpal tunnel syndrome, right lesion of the ulnar nerve and a single episode of major depression without mention of psychotic behavior. In a separate letter of the same date, it advised counsel that appellant could file an occupational disease claim for his right knee osteoarthritis and proposed surgery.

In a September 30, 2011 decision, OWCP denied appellant's right knee condition as consequential to his left knee injury. It found that the weight of the medical evidence rested with Dr. Draper.

By letter dated October 3, 2011, appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

⁵ The employing establishment prepared an investigative report dated September 30, 2010 which consisted of a surveillance video and a narrative summary of this video.

⁶ In a statement of accepted facts dated November 5, 2010, OWCP's claims examiner reviewed the surveillance video regarding appellant's activities and opined that he appeared to use his right upper extremity with free range of motion and without limitation in the noted activities. He carried and lifted objects and appeared to be in no apparent distress or discomfort while using his right arm to drive or his left leg to walk, bend, lift or climb steps.

In a March 28, 2012 decision, OWCP's hearing representative set aside the September 30, 2011 decision finding a conflict in medical opinion between Dr. Ross and Dr. Draper regarding the causal relationship of appellant's current right knee condition to the accepted left knee injury. On remand, he instructed OWCP to amend the statement of accepted facts to omit mention of the claims examiner's statement concerning the surveillance tape.

By letter dated April 2, 2012, counsel requested participation in the selection of an impartial medical specialist. He also requested that OWCP provide documentation, to prove that it properly selected the referee physician.

In a May 11, 2012 letter, OWCP advised counsel that Dr. Scott A. Rushton and Dr. Walter W. Dearolf, III, Board-certified orthopedic surgeons, and Dr. Jelen, had been selected using the PDS. It requested that appellant choose one of the physicians within seven days. A screenshot showed that Dr. Mark S. Rekant, a Board-certified orthopedic surgeon, was bypassed because he only treated the hand.

By letter dated May 15, 2012, counsel stated that he did not have any confidence in any of the three selected physicians. He again requested that OWCP select a physician from the PDS and send him screenshots for any bypassed physicians.

By letter dated May 16, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Jelen for an impartial medical examination. The record contains a May 16, 2012 iFECs Report: MEO23 Appointment Schedule Notification referring appellant to Dr. Jelen for an impartial medical examination. Additionally, a screenshot listed Dr. Jelen and Dr. Dearolf.

In a June 5, 2012 report, Dr. Jelen reviewed appellant's medical record a history of the May 16, 2008 employment-related injury, medical treatment and social and family backgrounds. He also reviewed the surveillance video from the employing establishment. Dr. Jelen listed findings on physical examination of both upper extremities, lumbar and cervical spines, both legs, feet and hips. He stated that appellant did not exhibit an abnormal gait while walking on the date of examination. On examination of the left knee, Dr. Jelen reported no effusion. There was mild anterior crepitus. There was no ligament instability or tenderness over the calf or thigh area. The knee was not swollen and was cool to palpate. Dr. Jelen's examination of the right knee showed no patellofemoral or true medial meniscus grinding. A McMurray's sign was negative, but there was pain during these testing maneuvers. There was no collateral or anterior cruciate ligament laxity. There was warmth more on the left side and swelling. A small effusion was present. There was no calf or thigh discomfort. Dr. Jelen advised that the right knee abnormalities were not related to the May 16, 2008 employment injury or aggravated by this injury. He stated that no detail was provided regarding any abnormalities on the left side that would cause or aggravate any right-sided knee abnormalities. There was no documentation to support Dr. Ross' statements that appellant walked with a severe limp for one year. There was no evidence on the surveillance video of a limp or any functional abnormality of the left knee from November 2009 through 2010 that would cause disability on the right side. Appellant walked without difficulty, carried flat boxes, went up and down stairs and got in and out of his car without significant limited motion or signs of pain or disability. Dr. Jelen reviewed the reports of Dr. David O. Weiss, a Board-certified orthopedic surgeon, Dr. Vincent L. Ferrara, a

Board-certified neurosurgeon, Dr. Ross and Dr. Brian J. Sennett, a Board-certified orthopedic surgeon, and stated that there was no explanation of how left knee abnormalities could cause right knee abnormalities. He also reviewed the 2010 x-ray and MRI scan of the right knee which revealed arthritis and meniscus tears. Dr. Jelen noted that appellant was over 300 pounds and the x-rays revealed degenerative arthritis in his right knee. These conditions alone could cause degenerative tearing of the medial and lateral meniscus. There was no discussion of overuse of the right knee as a result of a left knee abnormality other than appellant's statements during the interview on the date of examination. Dr. Jelen stated that the conclusions reached by Dr. Ross were not substantiated with any detail. Based on appellant's history and his physical examination findings, review of records and surveillance video, there was no evidence to support a right knee injury as a result of the May 16, 2008 employment injury. Any right knee symptoms occurred slowly with time and were of a chronic nature likely due to degenerative arthritis and appellant's excessive weight. Dr. Jelen advised that appellant's present disability was a direct result of his work-related injuries and not his right knee symptoms. He concluded that appellant's right knee condition and need for surgery did not arise from any altered gait due to the left knee injury.

In a July 2, 2012 decision, OWCP found that Dr. Jelen's report represented the weight of the medical evidence and denied appellant's request to expand his claim to include a right knee condition and authorization for the proposed right knee surgery.

By letter dated July 6, 2012, appellant, through his attorney, requested an oral hearing.

At the October 23, 2012 hearing, appellant testified that he relied on his right knee to support his weight following the accepted injuries. He walked with a knee brace and crutches while performing most of his work duties, which required walking and climbing into tractor trailers. Appellant eventually walked with a cane. He had no right knee problems prior to the accepted employment injuries. Appellant further contended that Dr. Jelen relied on an edited 23-minute surveillance video that unfairly portrayed his physical abilities. He stated that he had good days and bad days and the video did not accurately portray his degree of dysfunction. The video was taken well after appellant's left knee injury and surgery. Appellant stated that his ambulation problems were worse during the year following his injury and before his surgery. He contended that contrary to Dr. Jelen's opinion that his right knee problem was caused by his weight gain, it was due to depression and inactivity resulting from the accepted injuries.

In a January 11, 2013 decision, OWCP's hearing representative affirmed the July 2, 2012 decision. He found that the weight of the medical evidence rested with Dr. Jelen's impartial medical opinion which established that appellant's right knee condition was not causally related to the accepted May 16, 2012 employment injuries. The hearing representative stated that, Dr. Jelen provided a rationalized medical opinion. He was not prejudiced by his review of the surveillance video regarding appellant's physical activities and was properly selected using the PDS.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that

flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁷ Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.⁸

A claimant bears the burden of proof to establish a claim for a consequential injury.⁹ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence, which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹⁰

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.¹¹ When 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.¹²

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹³

⁷ *Albert F. Ranieri*, 55 ECAB 598 (2004).

⁸ A. Larson, *the Law of Workers' Compensation* § 10.01 (November 2000).

⁹ *J.J.*, Docket No. 09-27 (issued February 10, 2009).

¹⁰ *Charles W. Downey*, 54 ECAB 421 (2003).

¹¹ 5 U.S.C. § 8123(a).

¹² *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

¹³ *Raymond J. Brown*, 52 ECAB 192 (2001).

The medical management application (MMA), which replaced the PDS, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examination. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician. If an appointment cannot be scheduled in a timely manner or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.¹⁴

ANALYSIS

OWCP accepted that on May 16, 2008 appellant sustained an employment-related medial meniscus tear of the left knee, right carpal tunnel syndrome and lesion of the ulnar nerve and single episode of major depression without mention of psychotic behavior while in the performance of duty. Appellant contends that he sustained a right knee condition as a result of the accepted employment injuries which warranted surgery. The Board finds that he has not submitted sufficient medical evidence to establish his claim.

On March 28, 2012 OWCP's hearing representative found a conflict in medical opinion between Dr. Ross, an attending physician, who found that appellant's right knee condition which required surgery was causally related to an altered gait secondary to his employment-related left knee injury and Dr. Draper, an OWCP referral physician, who opined that appellant did not sustain a right knee condition due to his claimed gait or employment-related left knee injury. To resolve the conflict, OWCP referred appellant to Dr. Jelen, a Board-certified orthopedic surgeon, for an impartial medical examination.

On appeal, counsel contends that Dr. Jelen was not properly selected as the impartial medical examiner and, thus, OWCP improperly relied on his report in its decision. OWCP has an obligation to verify that it selected Dr. Jelen in a fair and unbiased manner. It maintains records for this very purpose.¹⁵ The record contains a May 16, 2012 Form MEO23 iFECs report stating that an impartial medical examination was scheduled with Dr. Jelen. The record also contains a screenshot that indicates the selection of Dr. Jelen. Further, the record contains a bypass screenshot for Dr. Rekant, who was bypassed because he only specialized in hand injuries.¹⁶ The Board finds that OWCP provided documentation and properly utilized its MMA system in selecting Dr. Jelen as the impartial medical examiner.¹⁷ The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the

¹⁴ See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012); see also *R.C.*, Docket No. 12-468 (issued October 15, 2012) (where the Board first discussed the application of the MMA and found that appellant's reasons for objecting to the list of impartial medical specialists provided by OWCP were not valid).

¹⁵ See *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 3.500.6 (July 2011).

¹⁷ See *N.C.*, Docket No. 12-1718 (issued April 11, 2013).

selected physician carry the special weight accorded to an impartial specialist. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.¹⁸

In his June 5, 2012 report, Dr. Jelen found that appellant's right knee condition which warranted surgery was not caused or aggravated by an altered gait or the accepted May 16, 2008 employment-related injuries. He further found that his current disability was a direct result of his work-related injuries and not his right knee symptoms. On physical examination of the right knee, Dr. Jelen found essentially normal findings with the exception of small effusion. He explained that there was no documentation that a right knee injury had occurred or discussion about overuse of the right knee as a result of a left knee abnormality other than appellant's statements during the interview on the date of examination. Dr. Jelen further explained that Dr. Ross did not provide any detailed documentation to support her opinion. In addition, Dr. Weiss, Dr. Ferrara, Dr. Ross and Dr. Sennett did not explain how left knee abnormalities could cause right knee abnormalities. Dr. Jelen noted that while the 2010 x-ray and MRI scan revealed arthritis of the right knee, this condition and appellant's excessive weight could cause degenerative tears of the medial and lateral meniscus. He advised that his right knee symptoms occurred slowly over time and were chronic in nature. Dr. Jelen reviewed the employing establishment's surveillance video and stated that there was no evidence of a limp or any functional abnormality of the left knee on all occasions from November 2009 through 2010 that would cause disability on the right side. He related that the video showed appellant walking without difficulty, carrying flat boxes, going up and down stairs and getting in and out of his car without significant limited motion or signs of pain or disability.

The Board finds that the opinion of Dr. Jelen is sufficiently well rationalized and based on a complete and an accurate factual and medical history such that it is entitled to special weight accorded an impartial medical examiner and establishes that appellant did not sustain a right knee condition as a consequence of his May 16, 2008 employment injuries.

Counsel contends on appeal that Dr. Jelen relied almost exclusively on the surveillance video even though an OWCP claims examiner's personal opinion regarding appellant's abilities as demonstrated on the video had been deleted from the statement of accepted facts reviewed by Dr. Jelen. He further contended that Dr. Jelen's report was not sufficiently rationalized as he failed to explain why an altered gait due to the employment-related left knee injury and deteriorating right knee condition as demonstrated by x-rays would not be a contributing factor to the cause or aggravation of appellant's right knee condition. The Board finds these contentions to be without merit. The Board has allowed physicians to review videotapes in evaluating an appellant's actual physical abilities.¹⁹ Appellant has not submitted evidence that the videotape improperly represents his activities such that it was inappropriate for Dr. Jelen to

¹⁸ Cf. *H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the Form MEO23 IF ECS report was the only documentation of the scheduled impartial medical specialist examination. There were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist and the issuance of an appropriate decision following any further development).

¹⁹ *Kathleen McKinnon*, Docket No. 00-2797 (issued April 26, 2002); *Armengol Beltram*, Docket No. 00-878 (issued February 25, 2002); *James E. Hudson*, Docket No. 01-858 (issued February 13, 2002); *George Zupko*, Docket No. 00-1107 (issued December 14, 2001).

rely upon it in reaching his decision. Moreover, the opinion of Dr. Jelen is clearly based on more than a review of the video. His medical report provided a thorough evaluation of appellant's factual and medical background and findings on physical examination. Dr. Jelen explained why the claimed gait and accepted employment-related injuries did not cause appellant's right knee condition. As stated, his opinion is entitled to the special weight accorded an impartial medical examiner and establishes that appellant did not sustain a right knee condition as a consequence of his work-related injuries.

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 appellant has failed to establish that he sustained a right knee condition for which surgery was warranted as a consequence of his May 16, 2008 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 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