

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Collins, CO, Employer**

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**Docket No. 13-1355
Issued: December 5, 2013**

Appearances:
John S. Evangelisti, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2013 appellant, through his representative, filed a timely appeal from the March 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the denial of his schedule award.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) 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 OWCP properly denied appellant's schedule award claim.

¹ Appellant also attempts to appeal OWCP's August 10, 2012 decision, but as more than 180 days has passed from the date of that decision to the filing of this appeal, the Board has no jurisdiction to act on that decision directly. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 3, 2008 appellant, a 42-year-old letter carrier, filed an occupational disease claim alleging that the arthritis in his right knee was a result of his federal employment. Dr. Kirk A. Kindsfater, the attending Board-certified orthopedic surgeon, reported that appellant's duties as a letter carrier had probably exacerbated his preexisting arthrosis. On July 7, 2008 OWCP accepted appellant's claim for a temporary aggravation of preexisting right knee osteoarthritis.³

A conflict in medical opinion later arose. Dr. Mark A. McFerran, the Board-certified orthopedic surgeon who took over appellant's care, opined that appellant's duties as a letter carrier for almost nine years had permanently aggravated his preexisting right knee osteoarthritis, which now required a total knee arthroplasty. Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon and second-opinion physician, disagreed. He opined that appellant's work-related repetitive movement injury had only temporarily aggravated his preexisting right knee osteoarthritis, such that the proposed arthroplasty would address the underlying or preexisting condition but was not medically necessary for the work-related injury.

Appellant underwent a right total knee arthroplasty on November 25, 2008 without authorization from OWCP. In 2009 he filed a schedule award claim.

Dr. Stephen Dinenberg, a Board-certified orthopedic surgeon and impartial medical specialist selected to resolve the conflict in medical opinion, found that appellant's right total knee arthroplasty was the result of the natural progression of preexisting degenerative changes and not the result of his federal employment, which caused only a temporary aggravation.

In a decision dated June 23, 2010, OWCP denied appellant's schedule award claim. It found that Dr. Dinenberg resolved the conflict. An OWCP hearing representative affirmed on March 10, 2011. On June 22, 2011 OWCP reviewed the merits of appellant's case and denied modification of its prior decision.

In the prior appeal,⁴ the Board set aside the latter two decisions. As there were no screenshots or other documentation in the record, the Board found that OWCP failed to establish that it properly selected the impartial medical specialist. The Board remanded the case for the selection of a second impartial medical specialist.

OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, to resolve the outstanding

³ OWCP advised Dr. Kindsfater what a temporary aggravation meant: "The preexisting condition has been worsened or made more severe for a period of time and the claimant has returned to his preinjury status without any residual alteration of the underlying condition. This involves a limited period of medical treatment and/or disability, after which the employee returns to his/her previous physical status. Compensation is payable only for the period of the aggravation established by the weight of the medical evidence and not for any disability caused by the underlying disease. This is true even if the claimant cannot return to the job held at the time of injury because the preexisting condition will worsen."

⁴ *Order Remanding Case*, Docket No. 11-2046 (issued May 9, 2012).

conflict on the nature of the work-related aggravation. It documented Dr. Lotman's selection by including in the record an iFECS [integrated Federal Employees' Compensation System] Report ME023 (appointment schedule notification), produced under the Medical Management Application (MMA), indicating that an impartial medical examination was scheduled with Dr. Lotman. OWCP also placed in the record a screenshot from the iFECS MMA showing Dr. Lotman's appearance in the selection rotation.

Appellant's representative objected to the selection on the grounds that he was able to find many Board-certified orthopedists located closer to appellant's zip code. He also objected that the statement of accepted facts failed to note appellant's continuing exposure to work activities, which continued to aggravate and accelerate his right knee osteoarthritis.

OWCP provided the representative with a copy of the screenshot showing that Dr. Lotman was randomly chosen upon the entry of appellant's zip code. It explained that Dr. Lotman was the first physician to appear in the rotation and that no physicians were bypassed. OWCP added that there were several reasons why the physicians identified by appellant's representative were not selected. It also advised that the statement of accepted facts specifically stated that appellant continued to work full-time unrestricted duty as a letter carrier, so no amendment was necessary.

Dr. Lotman evaluated appellant on June 13, 2012. He related appellant's history and chief complaint. Dr. Lotman described his findings on physical examination. He reviewed appellant's record and the statement of accepted facts. It was Dr. Lotman's opinion that appellant's employment as a letter carrier aggravated the preexisting arthritic condition in his right knee but did not cause or accelerate that condition.

Dr. Lotman reasoned that appellant's initial injury to his "left (sic) knee" occurred 28 years ago in a motorcycle accident, and after surgery he did not follow postoperative precautions concerning weight bearing, which jeopardized the final result for his knee. Prior to his federal employment, appellant was employed in other industries, some of which required much more physical labor including lifting and standing. Accepting the date of loss as being May 25, 2005,⁵ Dr. Lotman found that appellant's subsequent surgical and x-ray findings, including Grade 4 chondral changes, were not consistent with such a short time interval.

In a decision dated August 10, 2012, OWCP denied appellant's schedule award claim. It found that Dr. Lotman's opinion represented the weight of the medical evidence and established that appellant's federal employment temporarily aggravated his preexisting right knee condition and resolved. Thus, although appellant had an impairment of his right lower extremity, that impairment was a result of his preexisting condition and not a result of the accepted temporary aggravation.

During a telephone hearing before an OWCP hearing representative, appellant's representative argued that it was almost impossible that 113 physicians could be overlooked "if the PDS contains all the [B]oard-certified physicians."

⁵ This was the date appellant first became aware of his disease or illness, and the date OWCP used as the "date of injury."

In a decision dated March 4, 2013, OWCP's hearing representative affirmed the denial of appellant's schedule award claim. She found that the record failed to demonstrate that OWCP had not properly selected Dr. Lotman as the impartial medical specialist and also failed to support appellant's entitlement to a schedule award. The hearing representative found that Dr. Lotman premised his opinion on a complete and accurate factual and medical background, a review of appellant's case file and a comprehensive physical examination. She therefore found that his opinion constituted the weight of the medial evidence and established that appellant was not entitled to a schedule award as a result of the accepted work injury.

On appeal, appellant's representative argues that OWCP did not establish that it properly selected Dr. Lotman: "The burden is on [OWCP] to show that: all physicians in the specialty are actually in the PDS [Physician Directory System] and that all the physicians in the specialty were reviewed in the manner described in the PM [FECA Procedure Manual]." He argues that the conflict notices to appellant and to Dr. Lotman were insufficient. Appellant's representative argues that Dr. Lotman's evaluation was improper because he relied on a statement of accepted facts that did not state the claim was accepted for an occupational disease occurring over 14 years. He adds that Dr. Lotman's opinion is not well rationalized, as it assumed the claim was for a traumatic injury.

Appellant's representative also notes that appellant has filed two other claims, one for an occupational right knee degeneration and osteoarthritis due to continuing exposure to factors of employment through July 12, 2010 (OWCP File No. xxxxxx167), and another for an occupational right knee degeneration and osteoarthritis due to continuing exposure to factors of employment through October 20, 2011 (OWCP File No. xxxxxx621). He argues that OWCP refuses to process these claims, making it impossible for appellant to pursue a schedule award for the worsening of his condition.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁶ including that he sustained an injury in the performance of duty and that any specific condition or disability for which he claims compensation is causally related to that employment injury.⁷

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

⁶ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.⁹

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.¹⁰

The MMA, which replaced the PDS, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examinations. 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.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

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.¹³ Unless this procedure is carried out by OWCP, the intent of section

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹¹ See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012).

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

¹³ See *Nathan L. Harrell*, 41 ECAB 402 (1990).

8123(a) of the will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁴

ANALYSIS

On July 7, 2008 OWCP accepted appellant's occupational disease claim for a temporary aggravation of preexisting right knee osteoarthritis. As it would explain to Dr. Kindsfater, the attending orthopedic surgeon, this meant that appellant's preexisting condition was worsened or made more severe for a period of time but that appellant had returned to his preinjury status without any residual alteration of the underlying condition. OWCP's acceptance was thus a limited one. It did not imply any continuing work-related aggravation.

Appellant underwent a right total knee arthroplasty later that same year, which, consistent with its limited acceptance, OWCP did not authorize. In 2009 he filed a schedule award claim for the permanent impairment resulting from this surgery. Appellant thus bears the burden of proof to establish that any permanent impairment was causally related to the accepted employment injury, which presently stands as a temporary aggravation of preexisting right knee osteoarthritis.

A conflict arose between Dr. McFerran, the orthopedic surgeon who took over appellant's care, and Dr. Agarwal, the second-opinion orthopedic surgeon, on the nature of the employment-related aggravation. Dr. McFerran believed the aggravation was permanent and required a total knee arthroplasty. Dr. Agarwal believed that appellant's federal employment only temporarily aggravated his preexisting right knee osteoarthritis, such that the proposed surgery was not medically necessary for the work-related injury. OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Lotman, a Board-certified orthopedic surgeon, to resolve this conflict.

Selection of the impartial medical specialist is made through use of the MMA by a medical scheduler. The claims examiner is not able to dictate which physician serves as the impartial medical specialist. The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.¹⁵

The Board finds that OWCP properly selected Dr. Lotman. OWCP adequately documented Dr. Lotman's selection. The record contains the ME023 report showing the scheduled appointment generated under the MMA. It also contains a sufficiently legible

¹⁴ *Harold Travis*, 30 ECAB 1071 (1979).

¹⁵ *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

screenshot from the application showing Dr. Lotman's appearance in the automatic rotation. The Board has held that such evidence is sufficient to show that OWCP has met its affirmative obligation to establish that it properly followed its selection procedures.¹⁶ The Board finds that the argument raised by appellant's representative to the contrary is not substantiated.¹⁷

Dr. Lotman was of the opinion that appellant's employment as a letter carrier aggravated the preexisting arthritic condition in his right knee but did not accelerate it. He reasoned, in part, that appellant's surgical and x-ray findings, including Grade 4 chondral changes, were not consistent with such a short time interval from the date of loss, May 25, 2005. Appellant's representative correctly observes that Dr. Lotman may be under the impression that appellant suffered a traumatic injury on May 25, 2005, leaving too little time to develop the surgical and x-ray findings subsequently seen. As appellant's injury was occupational in nature, the Board finds that a supplemental report from Dr. Lotman is warranted.

OWCP shall ask Dr. Lotman for a supplemental report. It should make clear that the accepted employment injury was occupational in nature, not traumatic. Dr. Lotman must resolve whether appellant's duties as a letter carrier, over time, caused a temporary or permanent aggravation of his preexisting right knee osteoarthritis. He must support his opinion with sound medical rationale and objective findings. Following such further development as may be necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

As for the other injury claims appellant has filed, apparently for further aggravation of osteoarthritis following total knee replacement, the Board has no power to require OWCP to process these claims or issue decisions thereon. He is always free to file a later schedule award claim for any increased impairment causally related to the accepted employment injury.

CONCLUSION

The Board finds that this case is not in posture for decision. A supplemental report from the impartial medical specialist is warranted.

¹⁶ *Id.*

¹⁷ Appellant's representative assumes that "all physicians in the specialty" are included in the Medical Management Application database. That is not the case. The mere fact that he can find another Board-certified orthopedic surgeon or many Board-certified orthopedic surgeons, closer to appellant's zip code is irrelevant to whether OWCP properly followed its selection procedures, which the MMA ensures are automatic and strictly applied and which removes the claims examiner from the selection process.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: December 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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