United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 12-1417**
	)	**Issued: January 22, 2013**
GENERAL SERVICES ADMINISTRATION, PUBLIC BUILDING SERVICES, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
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 June 18, 2012 appellant filed a timely appeal from a May 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for a consequential injury. 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 this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that his claim for a consequential left knee injury causally related to an August 22, 1979 employment injury.

On appeal appellant contends that the evidence establishes that he sustained a consequential left knee injury causally related to an August 22, 1979 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 22, 1979 appellant, then a 32-year-old police officer, filed a traumatic injury claim alleging that he injured his low back that day while lifting a handcuffed suspect from the floor. OWCP accepted the claim for a low back strain, aggravation of L4 degenerative disc disease and authorized lumbosacral decompression surgery, which occurred on October 7, 1984 and March 3, 1998. It accepted consequential injuries of right knee contusion, aggravation of preexisting right knee osteoarthritis, head contusion and headaches and authorized right knee arthroscopic surgery, which was performed on October 29, 2009 and February 23, 2010. Appellant received compensation and retired from federal service as of September 1, 2010.[2]

On April 14, 2008 appellant filed a claim for a recurrence of medical treatment related to a fall he sustained on April 12, 2008 when his legs gave out while he was putting his walker into his car. He fell forward from his feet, but his knees did not move. Appellant noted that his right knee was bent forward more than the left knee and that his knees went in opposite directions.

In an April 15, 2008 report, Dr. Dina Zaza, a treating Board-certified physiatrist, reported that appellant's legs gave out while he was putting his walker into his car. She related that his legs were hyperextended. Appellant fell into the car and had right knee pain since the fall. Dr. Zaza diagnosed right knee pain as a result of his fall and referred appellant to Dr. Charles M. Creasman, a treating Board-certified orthopedic surgeon, for appellant's right knee pain.[3]

In a June 24, 2009 report, Dr. Zaza provided a history of the employment injury and physical findings. She reported that appellant sustained an injury to both his knees when his legs gave out while putting his walker into his car. Dr. Zaza attributed his fall and consequential bilateral knee injury to his neurological leg compromise, which was due to the spinal stenosis he developed as a result of his injury and surgeries. She explained that appellant's low back pain and spinal stensosis predisposed him to other injuries and bilateral leg weakness.

In a November 15, 2010 report, Dr. Ronald M. Lampert, a second opinion Board-certified orthopedic surgeon, reviewed the medical evidence of record, history of injury, a statement of accepted facts and set forth findings on physical examination. He diagnosed postoperative lumbar fusion, postoperative total right knee arthroplasty, resolved left hip pain, resolved right ankle pain and painful left knee with decreased motion. Appellant related injuring both his knees on April 12, 2008 when he lost feeling in his legs while putting his walker into the car and fell into the bumper. A physical examination revealed morbid obesity, markedly swollen legs and no effusion in either knee. Dr. Lampert opined that appellant's falls were due to his two back surgeries, but concluded there was no evidence of a consequential left knee injury due to the April 2008 fall.

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[2] On October 16, 2002 OWCP granted appellant a schedule award for a three percent permanent impairment of the right lower extremity and a three percent permanent impairment of the left lower extremity.

[3] In a June 5, 2008 report, Dr. Creasman noted that appellant fell in April 2008 and had continued right leg pain since. He diagnosed bilateral knee pain, with the pain worse in the right knee. A review of x-ray interpretations revealed osteoarthritis in both knees. On July 27, 2009 OWCP received a September 8, 2008 report from Dr. Creasman which attributed appellant's bilateral knee pain to an April 12, 2008 injury. Dr. Creasman reported that appellant had significant left knee osteoarthritis and mild right knee osteoarthritis.

By decision dated January 3, 2011, OWCP accepted the conditions of right ankle strain, and left hip tendinitis, which were both resolved. It denied appellant's claim for a consequential left knee condition as it found the medical evidence was insufficient to establish causal relationship.

On January 9, 2011 appellant requested an oral hearing before an OWCP hearing representative on the denial of his claim for a consequential left leg injury. He subsequently requested a review of the written record.

By decision dated August 4, 2011, OWCP's hearing representative set aside the January 9, 2011 decision denying appellant's claim for a consequential left leg injury and remanded the case for further development. The hearing representative instructed OWCP to obtain a supplemental opinion from Dr. Lampert on the issue of whether diagnostic arthroscopy was required to determine whether appellant sustained a consequential left knee injury.

In a September 12, 2011 supplemental report, Dr. Lampert opined that a left knee diagnostic arthroscopic was unnecessasry to determine whether appellant sustained a consequential left knee injury. He attributed appellant's left knee problems to his weight and the normal progression of underlying osteoarthritis. Dr. Lampert noted that, at the time of Dr. Zaza's April 15, 2008 report, the physician only referenced right medial knee pain with no mention of any left knee pain or problem.

By decision dated November 30, 2011, OWCP denied appellant's claim for a consequential left knee injury.

On December 3, 2011 appellant requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on March 12, 2012.

In a February 12, 2012 report, Dr. Zaza opined that appellant's bilateral knee condition was a direct result of the April 12, 2008 fall. She noted that he was seen on April 15, 2008 for complaints of bilateral knee pain after an April 12, 2008 incident in which appellant's legs gave out, both knees were hyperextended and he fell into his car. Dr. Zaza stated that appellant was referred to Dr. Creasman who initially recommended right knee arthroscopy, which was performed in October 2009. Dr. Creasman subsequently recommended left knee arthroscopy. A physical examination revealed abnormal gait as a result of left knee flexion and pain. Dr. Zaza opined that, while appellant had a history of knee osteoarthritis, she attibuted his bilateral knee conditions to the April 12, 2008 incident.

By decision dated May 30, 2012, OWCP's hearing representative affirmed the denial of a consequential left knee injury.[4]

[4] The Board notes that, following the May 30, 2012 hearing representative's decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

The general rule respecting consequential injuries is 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.[5] The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.[6] With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.[7]

Section 8123(a) of FECA provides in pertinent part: "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."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[9]

ANALYSIS

OWCP accepted the claim for a low back strain, aggravation of L4 degenerative disc disease and authorized lumbosacral decompression surgery, which occurred on March 3, 1998. It subsequently accepted consequential injuries of right knee contusion, aggravation of preexisting right knee osteoarthritis, head contusion and headaches and authorized right knee arthroscopic surgery, which was performed on October 29, 2009 and February 23, 2010. The issue on appeal is whether appellant sustained a consequential left knee condition due to his accepted August 22, 1979 employment injury.

In his November 15, 2010 and September 12, 2011 reports, Dr. Lampert, an OWCP second opinion Board-certified orthopedic surgeon, concluded that appellant's April 12, 2008 fall did not cause a consequential left knee injury due to the April 2008 fall. Dr. Lampert, in a September 12, 2011 supplemental report, attributed appellant's left knee condition to his weight and normal progression of osteoarthritis.

In her April 15, 2008, June 24, 2009 and February 12, 2012 reports, Dr. Zaza reported that appellant's fall on April 12, 2008 caused a hyperextension of both legs. In her June 24, 2009 and February 12, 2012 reports, she concluded that appellant sustained a bilateral knee injury as a result of the April 12, 2008 fall. In her June 24, 2009 report, Dr. Zaza explained that

[5] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[6] *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

[7] *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[8] 5 U.S.C. § 8123(a); *see T.C.*, Docket No. 08-2112 (issued June 12, 2009).

[9] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *William C. Bush*, 40 ECAB 1064 (1989).

appellant's fall and bilateral knee injury was attributable to a neurological compromise resulting from the spinal stenosis appellant developed following his employment injury and resulting surgeries. She stated that, while appellant had a history of knee osteoarthritis, she attributed his bilateral knee conditions to the April 12, 2008 incident.

The Board finds a conflict in the medical opinion evidence between Dr. Zaza, appellant's treating physician, and Dr. Lampert, an OWCP referral physician.[10] The Board will remand the case to OWCP to prepare a statement of accepted facts and a list of questions and refer appellant to an appropriate Board-certified physician for an impartial medical evaluation, pursuant to 5 U.S.C. § 8128(a), to determine whether appellant sustained a left knee consequential injury resulting from the August 22, 1979 employment injury. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 30, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: January 22, 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

[10] *Bryan O. Crane*, 56 ECAB 713 (2005).