

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

S.E., Appellant)
and) Docket No. 14-963
U.S. POSTAL SERVICE, BEN FRANKLIN) Issued: August 13, 2014
STATION, Washington, DC, Employer)
)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 19, 2014 appellant, through his attorney, filed a timely appeal from a January 27, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for surgical authorization. Pursuant to the Federal Employees' Compensation Act¹ (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 request for authorization for right knee surgery.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated December 19, 2011, the Board affirmed a November 18, 2010 decision rescinding a finding that appellant had more

¹ 5 U.S.C. § 8101 *et seq.*

than a 54 percent permanent impairment of the left lower extremity.² The Board found that the medical evidence established that he had no more than a 37 percent left lower extremity impairment and was not entitled to an additional schedule award. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference. The facts relevant to this appeal are set forth.

In a report dated July 6, 2012, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, discussed appellant's complaint of increased pain in the right knee. He diagnosed right knee traumatic synovitis and a probable tear of the medial meniscus. Dr. Azer attributed the right knee condition to increased weight bearing as a result of appellant's left knee injury.

On August 7, 2012 Dr. Azer performed a partial synovectomy, partial medial meniscectomy, abrasive arthroplasty and patella shaving of the right knee. He determined that appellant required a total knee replacement.

On September 20, 2012 appellant requested that OWCP accept that he sustained a consequential injury to his right knee due to his accepted left knee injury.

In a progress report dated October 10, 2012, Dr. Azer opined that x-rays of the right knee showed tricompartmental arthritic changes. He recommended a right knee total replacement. Dr. Azer stated, “[Appellant’s] condition, the recommended treatment and residuals are caused by his work injury of August 27, 1984.” On November 9 and 23, 2012 he again recommended a right total knee replacement necessitated by the August 27, 1984 work injury.

In a report dated December 21, 2012, Dr. Azer related that he performed a revision of appellant's left total knee replacement on July 20, 2006. He stated, “[Appellant’s] work injury of August 27, 1984 resulted in the excess wear and tear of the right knee, which for 28 years has been carrying much more load and wear and tear and has now reached a stage to need a right total knee replacement. [He] will be scheduled for a right total knee replacement caused by the work injury of August 27, 1984.”

On March 29, 2013 Dr. Lawrence A. Manning, an OWCP medical adviser, noted that appellant injured his left knee on August 27, 1984 and subsequently underwent multiple left knee surgeries. Dr. Azer first diagnosed a degenerative right knee condition in May 2008, almost 25 years after the injury. Dr. Manning found that the right knee condition might be a progression of degenerative arthritis and recommended a second opinion evaluation to determine whether it resulted from “a natural progression or is secondary to increased stress on his knee due to the contralateral knee injury.”

On May 7, 2013 OWCP referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 20, 2013,

² Docket No. 11-834 (issued December 19, 2011) OWCP accepted that on August 27, 1984 appellant, then a 44-year-old carrier, sustained a torn medial meniscus of the left knee in the performance of duty. It further accepted arthropathy of the left lower leg, complications due to internal joint prosthesis and effusion of the left lower leg joint. Appellant underwent multiple surgeries on the left knee, including a total knee replacement in September 2003 and a revision of a left total knee replacement in July 2006.

Dr. Hanley discussed appellant's history of a left knee injury in August 1984 resulting in a total knee replacement in 2003 and revision in 2006. He noted that in 2008 he experienced right knee symptoms that increased overtime. Dr. Hanley diagnosed right knee degenerative arthritis. He stated:

"[Appellant] has degenerative joint disease of the right knee which is probably approaching its end stages and could be definitely treated at this time with total knee replacement. However, this diagnosis of degenerative arthritis of the right knee has absolutely no relationship either by direct cause, aggravation, precipitation or acceleration to his original injury of August 27, 1984. That injury was a specific injury to the left knee that caused a meniscus tear requiring treatment and intervention. [Appellant] has gone on to develop degenerative disease in the other knee and apparently both hips as well as a consequence of the natural aging process."

Dr. Hanley advised that appellant might be predisposed to degenerative disc disease due to his large size. He further noted that appellant did not experience symptoms on the right side for 15 years after the injury. Dr. Hanley stated, "The concept of 'injuring the right knee because he put too much weight on it' is a weak and time-worn excuse in people that are already susceptible to the development of degenerative disease."

By decision dated July 18, 2013, OWCP denied appellant's request for authorization for a right total knee replacement. It found that Dr. Hanley's report constituted the weight of the medical evidence and established that his left knee injury did not cause or contribute to his right knee condition. Thus, the requested surgery was not causally related to the August 27, 1984 work injury.

On July 31, 2013 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative.

In a progress report dated September 6, 2013, Dr. Azer discussed appellant's lumbar and bilateral knee conditions. He advised that appellant's August 27, 1984 employment injury resulted in an "unbalanced gait affecting mostly the right side with more wear and tear over the right knee, right hip and lumbar spine as a result of which he developed traumatic arthritis in the right knee with lumbar disc syndrome." Dr. Azer opined that appellant required a total knee replacement. On November 29, 2013 he asserted that the August 27, 1984 employment injury caused the right knee condition.

At the December 2, 2013 hearing, appellant's attorney contended that appellant might have a new injury to the right knee rather than a consequential condition. Appellant related that his modified work duties caused pressure on his right knee, especially as he was unable to use his left knee.

In a report dated December 16, 2013, Dr. Azer related that overloading the right knee caused traumatic arthritis of the medial, lateral and patellofemoral compartments. He determined that appellant required a total right knee replacement due to his accepted work injury.

By decision dated January 27, 2014, the hearing representative affirmed the July 18, 2013 decision.

LEGAL PRECEDENT

Section 8103 of FECA³ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree of the period of disability or aid in lessening the amount of monthly compensation.⁴ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under section 8103, with the only limitation on its authority being that of reasonableness.⁵ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁶ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.⁷

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 examination.⁸ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, it shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS

OWCP accepted that appellant sustained a torn medial meniscus of the left knee, arthropathy of the left lower leg, internal joint prosthesis complications and left lower leg effusion as a result of an August 27, 1984 work injury and subsequent left knee surgeries. Appellant underwent a left total knee replacement in September 2003 and a revision of the total knee replacement in July 2006.

³ See *supra* note 1.

⁴ 5 U.S.C. § 8103; see *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁵ *Joseph P. Hofmann*, 57 ECAB 456 (2006); *James R. Bell*, 52 ECAB 414 (2001).

⁶ *Claudia L. Yantis*, 48 ECAB 495 (1997).

⁷ *Cathy B. Mullin*, 51 ECAB 331 (2000).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

On July 6, 2012 Dr. Azer attributed appellant's complaints of right knee pain to a shift in weight bearing resulting from his left knee injury. He diagnosed traumatic synovitis and a probable medial meniscal tear of the right knee. Following arthroscopic surgery on August 7, 2012, Dr. Azer recommended a right total knee replacement. In a report dated December 21, 2012, he related that he performed a revision of appellant's left total knee replacement in July 2006. Dr. Azer asserted that appellant bore his weight largely on the right side from 1984 onward and that the increased wear and tear on the right knee over the course of 28 years resulted in his need for a right total knee replacement. On September 6, 2013 he related that appellant's uneven gait due to his August 27, 1984 work injury caused increased wear and tear on the right knee, right hip and lumbar spine resulted in right knee traumatic arthritis. In a progress report dated December 16, 2013, Dr. Azer opined that appellant required a right total knee replacement as a result of his accepted employment injury.

In a report dated May 7, 2013, Dr. Hanley an OWCP referral physician, reviewed the history of injury and diagnosed degenerative arthritis of the right knee. He opined that a right total knee replacement was a reasonable procedure to treat the degenerative arthritis. Dr. Hanley found, however, that the degenerative arthritis was unrelated to the August 27, 1984 work injury. He attributed appellant's right knee degenerative disease to natural aging and a possible predisposition due to his size. Dr. Hanley noted that he did not have symptoms on the right side until 15 years after the injury and challenged the idea that putting too much weight on the knee caused an injury in an individual predisposed to degenerative disease.

The Board finds that there exists a conflict in medical opinion between Dr. Azer, appellant's attending physician, who found that appellant required a total right knee replacement due to his August 27, 1984 work injury and Dr. Hanley, an OWCP referral physician who found that the surgery was reasonable but that it was unrelated to his employment injury. 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 examination.¹⁰ On remand, OWCP should refer appellant to an appropriate specialist for an impartial medical evaluation to determine whether he requires a right total knee replacement as a result of his August 27, 1984 left knee injury. After such further development as it deems necessary, it should issue a *de novo* decision regarding appellant's request for authorization for surgery.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁰ See *supra* note 8; R.H., 59 ECAB 382 (2008).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 13, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
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