

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

S.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Cincinnati, OH, Employer**

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**Docket No. 13-1149
Issued: January 16, 2014**

Appearances:
Brad Harris, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2013 appellant, though counsel, filed a timely appeal from the October 15, 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 over the merits of this case.²

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a right knee injury as a consequence of her accepted left knee injury.

¹ 5 U.S.C. §§ 8101-8193.

² In a July 18, 2013 order, the Board denied appellant's request for oral argument before the Board finding that appellant's arguments could be addressed on appeal and that oral argument in the appeal would further delay issuance of a Board decision and not serve a useful purpose.

FACTUAL HISTORY

OWCP accepted that on September 8, 2003 appellant, then a 52-year-old nursing assistant, sustained a left knee strain and left medial meniscus tear when she twisted her left knee while assisting with the transfer of a patient from a bed to a stretcher.³ She stopped work on September 9, 2003 and returned to work on September 10, 2003.⁴

On February 27, 2004 Dr. James T. Bilbo, an attending Board-certified orthopedic surgeon, performed surgery on appellant's left knee, including arthroscopy, partial medial meniscectomy, abrasion arthroplasty of her medial femoral condylar and lateral tibial plateau articular surfaces, partial lateral meniscectomy with chondroplasty of her lateral compartment and articular surfaces and chondroplasty of her patella and femoral trochlear groove articular surfaces. These procedures were authorized by OWCP.⁵

In a January 30, 2006 report, Dr. Bilbo stated that appellant's need for a joint replacement was the result of dormant, preexisting degenerative changes in her left knee that were further aggravated by her work-related injury. Because appellant had failed limited operative and nonoperative treatment, the only other alternative was to undergo total joint replacement. Dr. Bilbo stated, "Were it not for the work[-]related injury and subsequent surgery, she may not have required the joint replacement, especially at this time."

In a November 13, 2008 report, Dr. Forest Heis, an attending Board-certified orthopedic surgeon, stated that appellant sustained a right knee injury as a consequence of her September 8, 2003 left knee injury. He noted that, while she had a preexisting right knee condition, the effects of her left knee condition caused a worsening of her right knee condition.

In letters dated February 5, 10 and 13, 2009, counsel argued that appellant had sustained a right knee injury as a consequence of her accepted left knee injury.

In a March 5, 2009 report, Dr. Paul Cangemi, a Board-certified orthopedic surgeon serving as an OWCP referral physician, described appellant's medical history and reported the findings of his examination. He stated, "The additional stress of weight bearing following the injury on her left knee was inconsequential as compared to the history of the disease process in her right knee. I do not feel that this resulted in a relevant or significant aggravation of a preexisting condition or arthritis in the right knee."

³ Appellant indicated that the stretcher failed to lock when she pulled up on it.

⁴ Appellant previously sustained a twisting injury to her left knee on July 23, 1998 and she underwent OWCP-authorized left knee surgery on November 9, 1998, including arthroscopy, partial medial meniscectomy, chondroplasty and abrasion arthroplasty of her patellar articular surface and chondroplasty of her medial femoral condylar and lateral tibial plateau articular surfaces. On October 6, 2000 she underwent right knee surgery, including partial medial meniscectomy, chondroplasty of her patella, medial femoral condyle and medial tibial plateau articular surfaces and abrasion arthroplasty of her patellar articular surface.

⁵ In August 26, 2003, Dr. Bilbo had stated that appellant reported that both of her knees were becoming increasingly symptomatic. He observed that she had a somewhat antalgic gait pattern and that there was guarding at terminal motion. Dr. Bilbo stated that x-ray testing showed progression of degenerative changes in both knees with marginal spur formation and narrowing but not complete collapse of the medial compartments.

In an April 30, 2009 decision, OWCP granted appellant a schedule award for 50 percent permanent impairment of her left leg. The award ran for 144 weeks from April 15, 2009 to January 17, 2012.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Heis and Dr. Cangemi regarding whether appellant sustained a right knee injury as a consequence of her accepted left knee injury. In order to resolve the conflict, it referred appellant to Dr. Arthur F. Lee, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on whether she sustained such a consequential injury.

In August 7 and October 17, 2009 reports, Dr. Lee detailed appellant's factual and medical history and provided his examination findings.⁶ He noted that she was involved in a September 8, 2003 event where she sustained a left knee strain, but indicated that the left knee strain "did not appear to cause any significant alteration or change in this woman's natural history when one considers the medical records." Dr. Lee noted that this statement took into account Dr. Bilbo's own medical records describing absolutely no change in appellant's examination between August 26 and September 23, 2003. He indicated that appellant had progressive degeneration changes with gait abnormalities and early varus deformities before the September 8, 2003 accident occurred, as documented by an August 26, 2003 report. Dr. Lee stated that the natural history of her arthritic knees, particularly considering her weight, necessitated left knee total knee replacement because of her preexisting nonwork-related arthritis. He posited that none of the surgeries performed were necessitated by the September 8, 2003 injury and stated:

"There is certainly no indication that the natural history of this woman's right knee was in anyway altered or changed due to the September 8, 2003 event. From an employment perspective there would be no limitations or restrictions placed upon [appellant] because of her history of the September 8, 2003 injury. She has completely recovered from this event and is left with no permanent sequelae."

In a November 17, 2009 decision, OWCP denied appellant's claim noting that Dr. Lee, the impartial medical specialist, provided a well-rationalized opinion finding that she did not sustain a right knee injury as a consequence of her accepted left knee injury.

In a February 22, 2010 decision, OWCP's hearing representative set aside OWCP's November 17, 2009 decision and remanded the case to OWCP for further development. He found that OWCP had not produced a proper statement of accepted facts that included all of the accepted work conditions and surgeries. The hearing representative indicated that, on remand, OWCP should produce an updated, complete statement of accepted facts and should refer the case to Dr. Lee for a supplemental opinion regarding whether appellant sustained a right knee injury as a consequence of her accepted left knee injury.

⁶ The August 7, 2009 report contained examination findings from that date and the October 17, 2009 report contained a review of the medical records.

On remand, OWCP produced a new statement of accepted facts and referred the case to Dr. Lee for a supplemental report. It requested that Dr. Lee respond to various questions. On April 7, 2010 Dr. Lee stated in response:

“(1) Has [appellant’s] right knee condition been caused or aggravated by the work[-]related injuries and authorized surgeries of July 23,1998 and September 8, 2003 as described in the [statement of accepted facts] SOAF? Answer: [Her]right knee condition has not, in anyway, been caused or aggravated by the work[-]related injuries and authorized surgeries of July 23,1998 or September 8, 2003.

“(2) If aggravated, please indicate whether it was a temporary or permanent aggravation? Please explain in detail. Answer: It is my professional opinion, based upon the [SOAF] information, that [appellant] did not sustain any aggravation whether it be temporary or permanent.”

In an April 28, 2010 decision, OWCP denied appellant’s claim that she sustained a right knee injury as a consequence of her accepted left knee injury, noting that the well-rationalized opinion of Dr. Lee, the impartial medical specialist, showed that she did not sustain such an injury.

Appellant submitted a May 10, 2011 report in which Dr. Heis again indicated that she sustained a right knee injury as a consequence of her accepted left knee injury.

In a July 27, 2012 decision, OWCP affirmed its April 28, 2010 decision denying appellant’s consequential injury claim indicating that the weight of the medical opinion evidence on this matter continued to rest with the opinion of the impartial specialist, Dr. Lee.

Counsel continued to argue that appellant sustained a consequential right leg condition and submitted additional medical reports regarding the condition of her legs.

In an October 15, 2012 decision, OWCP affirmed its July 27, 2012 decision denying appellant’s consequential injury claim again noting that the weight of the medical opinion evidence on this matter continued to rest with the opinion of Dr. Lee.

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 employees own intentional conduct.⁷ A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence.⁸

⁷ S.S., 59 ECAB 315 (2008).

⁸ *Charles W. Downey*, 54 ECAB 421 (2003).

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.”⁹ 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.¹⁰ 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.¹¹

In a situation where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹² If the impartial medical specialist is unable to clarify or elaborate on his or her original report or if his or her supplemental report is also vague, speculative or lacking in rationale, OWCP should submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹³

ANALYSIS

OWCP accepted that appellant sustained a left knee strain, left medial meniscus tear and aggravation of osteoarthritis of her left knee when she twisted her left knee at work on September 8, 2003.¹⁴ Appellant claimed that she sustained a right knee injury as a consequence of her accepted left knee injury, but it denied her claim based on the opinion of Dr. Lee, a Board-certified orthopedic surgeon serving as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Heis, appellant’s attending Board-certified orthopedic surgeon, and Dr. Cangemi, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹³ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹⁴ Appellant previously sustained a twisting injury to her left knee on July 23, 1998 and she underwent OWCP-authorized left knee surgery on November 9, 1998, including arthroscopy, partial medial meniscectomy, chondroplasty and abrasion arthroplasty of her patellar articular surface, and chondroplasty of her medial femoral condylar and lateral tibial plateau articular surfaces. On October 6, 2000 appellant underwent right knee surgery which was not authorized by OWCP. On February 27, 2004 she underwent left knee surgery which was authorized by it.

appellant sustained a right knee injury as a consequence of her accepted left knee injury.¹⁵ In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Lee for an impartial medical examination and an opinion on the matter.

The Board finds that, despite being provided an opportunity to produce a supplemental report, Dr. Lee failed to produce a well-rationalized opinion on the question of whether appellant sustained a right knee injury as a consequence of her accepted left knee injury. Therefore, his opinion does not represent the weight of the medical evidence with respect to this matter.¹⁶

In August 7 and October 17, 2009 reports, Dr. Lee detailed appellant's factual and medical history and provided his examination findings,¹⁷ but he did not provide a clear opinion on the relevant issue of this case, *i.e.*, whether she sustained a right knee condition due to her September 8, 2003 left knee injury. He devoted much of the text of these reports to explaining why he felt that the September 8, 2003 was insignificant in nature and did not contribute to the need for OWCP-authorized surgery. For example, Dr. Lee stated, "There is certainly no indication that the natural history of this woman's right knee was in anyway altered or changed due to the September 8, 2003 event." In this regard, his opinion is not based on a complete and accurate factual and medical history as he appears to deviate from the facts in the statement of accepted facts regarding accepted conditions and surgeries.

In order to gain an opinion from Dr. Lee regarding the issue of a consequential right knee injury, OWCP produced a new statement of accepted facts and requested a supplemental report. Dr. Lee's supplemental report still did not provide a detailed opinion on the existence of a consequential right knee injury; his opinion was conclusory in nature and did not contain any supporting medical rationale. For example, in response to a question regarding whether appellant's right knee condition was caused or aggravated by the work-related injuries and authorized surgeries, Dr. Lee merely stated that appellant's "right knee condition has not, in anyway, been caused or aggravated by the work-related injuries and authorized surgeries of July 23, 1998 or September 8, 2003."¹⁸

The Board finds that there is a continuing conflict in the medical opinion evidence regarding whether appellant sustained a right knee injury as a consequence of her accepted left knee injury. Therefore, appellant and the case record should be referred to a new impartial medical specialist for an examination and opinion on the issue of whether she sustained a

¹⁵ In a November 13, 2008 report, Dr. Heis stated that appellant sustained a right knee injury as a consequence of her September 8, 2003 left knee injury. In contrast, Dr. Cangemi indicated on March 5, 2009 that she did not sustain a consequential injury.

¹⁶ *See supra* note 11.

¹⁷ The August 7, 2009 report contained examination findings from that date and the October 17, 2009 report contained a review of the medical records.

¹⁸ The Board further notes that it is unclear whether Dr. Lee was provided with an adequate definition of a consequential injury under FECA.

consequential right knee injury.¹⁹ After such development it deems necessary, OWCP shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained a right knee injury as a consequence of her accepted left knee injury. The case is remanded to OWCP for further development of the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision.

Issued: January 16, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁹ See *supra* note 13.