United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 14-326**
	)	**Issued: February 5, 2015**
DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument June 4, 2014

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 27, 2013 appellant filed a timely appeal from the September 16 and October 7, 2013 merit decisions and a September 30, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are whether OWCP properly denied: (1) appellant's request for authorization of total left knee replacement surgery; (2) appellant's schedule award claim; and (3) appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on May 11, 2010 appellant, then a 59-year-old census enumerator, sustained a work-related injury when he fell after steps cracked underneath his feet while working in Delray Beach, FL. It accepted his claim for a left ankle sprain, tear of his left Achilles tendon, current tear of the medial meniscus of his left knee and old bucket handle tear of the medial meniscus of his left knee. Appellant stopped work on May 11, 2010. He underwent a left Achilles tendon repair on May 17, 2010 which was authorized by OWCP.[2] Appellant initially received continuation of pay and started receiving compensation for temporary disability on June 26, 2010.

In late December 2010, Dr. Jeffrey Sabloff, an attending Board-certified orthopedic surgeon, requested that appellant receive authorization from OWCP for arthroscopic left knee surgery.[3] On January 28, 2011 he noted that appellant had severe lateral compartment arthritis and patellofemoral arthritis. Dr. Sabloff indicated that appellant was wearing a leg brace and doing home exercises while awaiting approval for left knee surgery.

On April 15, 2011 appellant underwent left knee surgery, including medial and lateral meniscectomy, loose body removal, synovectomy and debridement of his anterior cruciate ligament. The surgery was authorized by OWCP.

In a November 30, 2011 report, Dr. Robert A. Smith, a Board-certified orthopedic surgeon serving as an OWCP referral physician, noted that appellant had a long history of left knee problems dating back to high school but did not undergo corrective surgery until 1990. He stated that the 1965 injury, which was not corrected until 1990, resulted in end stage arthritis of the left knee. Dr. Smith concluded that the need for total left knee replacement was due to the end stage arthritis resulting from his prior nonwork-related injury without timely treatment and was not related to the May 11, 2010 work injury.

In a December 9, 2011 decision, OWCP denied appellant's request for authorization of total left knee replacement surgery finding that the weight of the medical opinion evidence rested with the opinion of OWCP referral physician, Dr. Smith.

In a December 30, 2011 report, Dr. Sabloff indicated that appellant's need for total left knee replacement surgery was due to his May 11, 2010 work injury which "exacerbated and deteriorated" the preexisting arthritic condition of his left knee.

On May 17, 2012 an OWCP hearing representative set aside OWCP's December 9, 2011 decision denying authorization for left knee surgery. He determined that there was a conflict in the medical opinion evidence on this matter between Dr. Sabloff and Dr. Smith and remanded the case to OWCP for referral of appellant to an impartial medical specialist for an examination and evaluation regarding his claimed need for surgery due to his work injury.

[2] The record reflects that appellant sustained a meniscus tear of his left knee in a nonwork-related injury in 1965 and underwent a left meniscectomy in 1990 to repair this injury.

[3] Dr. Sabloff later indicated that the required surgery was a total left knee replacement procedure.

On remand, appellant was referred to Dr. John B. Cohen, a Board-certified orthopedic surgeon for an impartial medical evaluation. In his June 22, 2012 report, Dr. Cohen concluded that appellant needed to undergo total left knee replacement surgery and stated:

> "At this time, we have [appellant] who clearly has preexisting arthritis of his knee. [Appellant] may have either aggravated or accelerated his arthritic process. I think it will be helpful to review the initial x-ray done in Florida at the time of the injury and subsequent x-rays from Dr. Sabloff's office…. I believe though that the majority of his symptoms are due to preexisting disease but cannot state so until I have been able to review his sequential x-rays performed both in Florida and by Dr. Sabloff. I believe in this case a compromise as to [appellant's] cause would he appropriate and believe [that] the appropriate ratio [would] be 60 [percent] preexisting and 40 [percent] from the injury, but I think it is especially important to be able to review the initial emergency room evaluation, at which time, he was treated for his Achilles tendon rupture to see if he had any initial pain complaints and what the x-ray of his knee showed at that initial visit. It should be noted [that] he did have a prior history in 2008 and this note would also be helpful to review."

OWCP provided Dr. Cohen with additional medical records and requested that he provide a supplemental report regarding appellant's need for total left knee replacement surgery. In a July 24, 2012 report, Dr. Cohen discussed the additional medical records and stated, "[Appellant's] injury may have aggravated his preexisting arthritis. It is not for me to act as a judge on this question. [Appellant] has had progressive arthritis since 2008 and it is clear that he requires a total knee replacement, but it was preexisting to some degree prior to his injury of May 2010."

OWCP again requested that Dr. Cohen clarify his reports with respect to appellant's need for total left knee replacement surgery. It indicated that it appeared that all the relevant medical documents in existence had been provided.[4] On August 13, 2012 Dr. Cohen stated:

> "[Appellant] does require a left total knee replacement because of end-stage tricompartment arthritis. I believe [that] this arthritis is clearly present prior to his injury. It may have been aggravated by his injury, but that is not for me to decide. I do not think a slip and fall causes a significant amount of arthritis. The arthritis instead is progressive and unrelated to his injury."

For a third time, OWCP requested that Dr. Cohen provide a supplemental report regarding appellant's need for total left knee replacement surgery. In an October 5, 2012 report, Dr. Cohen noted that the records did not support appellant's claim that his left knee arthritis was caused by his May 11, 2010 injury. He indicated that appellant had preexisting arthritis that had undergone a natural progression and stated, "Dr. Sabloff's x-rays do not put the contention that

[4] Appellant has indicated that Dr. Sabloff did not take x-rays of his left knee around the time of his May 11, 2010 injury, but that the first x-rays of his left knee were taken in December 2010. These December 2010 x-rays were provided to Dr. Cohen.

this was a new problem. The [magnetic resonance imaging] scan clearly indicates that [appellant] had tricompartmental arthritis at the time of his presentation to Dr. Sabloff."

On October 4, 2012 appellant filed a claim for a schedule award due to his work-related left knee condition. In an October 16, 2012 letter, OWCP requested that he obtain a current impairment rating from his attending physician, applying the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).[5]

In an October 17, 2012 decision, OWCP denied appellant's request for authorization of total left knee replacement surgery finding that the weight of the medical opinion evidence rested with the opinion of the impartial medical specialist, Dr. Cohen.

On May 1, 2013 Dr. Sabloff performed total left knee replacement surgery which was not authorized by OWCP.

In a July 10, 2013 letter, OWCP again requested that appellant obtain a current report from an attending physician, which indicated that he had reached maximum medical improvement and which contained an impairment rating applying the standards of the sixth edition of the A.M.A., *Guides.*

In an August 4, 2013 report, Dr. Sabloff noted that there was no motor or sensory loss observed in appellant's left leg. He indicated that appellant should continue with physical therapy.

In a September 16, 2013 decision, an OWCP hearing representative affirmed OWCP's October 17, 2012 decision denying appellant's request for authorization of total left knee replacement surgery. She found that the weight of the medical opinion evidence rested with the multiple reports of the impartial medical specialist, Dr. Cohen.

Appellant requested reconsideration of OWCP's September 16, 2013 denial of his surgery request and submitted a number of postsurgery physical therapy notes.

In a September 30, 2013 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In an October 7, 2013 decision, OWCP denied appellant's schedule award claim on the grounds that he did not submit a probative impairment rating in support of his claim. It stated, "As of today's date you have not submit[ted] an impairment rating for your schedule award. The medical evidence of file fails to demonstrate a measurable impairment."

[5] This report was to include a finding that appellant had reached maximum medical improvement.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA states in pertinent part:

> "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 the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation."[6]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[7] The only limitation on OWCP's authority is that of reasonableness.[8] 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.[9]

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[10] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[11]

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."[12] 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.[13] 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.[14]

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[6] 5 U.S.C. § 8103.

[7] *Vicky C. Randall*, 51 ECAB 357 (2000).

[8] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[9] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[10] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[11] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[12] 5 U.S.C. § 8123(a).

[13] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

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

In a situation where OWCP secures an opinion from an impartial medical examiner 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.[15] If an impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must 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.[16]

ANALYSIS -- ISSUE 1

OWCP accepted that on May 11, 2010 appellant sustained a work-related injury when he fell after steps cracked underneath his feet. It accepted his claim for a left ankle sprain, tear of his left Achilles tendon, current tear of the medial meniscus of his left knee and old bucket handle tear of the medial meniscus of his left knee. On May 17, 2010 appellant underwent a left Achilles tendon repair. On April 15, 2011 he underwent left knee surgery, including medial and lateral meniscectomy, loose body removal, synovectomy and debridement of his anterior cruciate ligament. These procedures were authorized by OWCP. Appellant requested authorization for total left knee replacement surgery based on the opinion Dr. Sabloff, an attending Board-certified orthopedic surgeon.[17] OWCP denied his request for authorization for total left knee replacement surgery finding that the weight of the medical opinion evidence rested with the opinion of Dr. Cohen, who served as an impartial medical specialist.

The Board finds that OWCP properly determined that there was a conflict in the medical opinion evidence regarding appellant's need for total left knee replacement surgery due to his March 11, 2010 work injury and referred him to Dr. Cohen for an impartial medical examination and evaluation regarding his claimed need for surgery due to his work injury.[18]

In his June 22, 2012 report, Dr. Cohen concluded that appellant needed to undergo total left knee replacement surgery. However, he provided an equivocal opinion regarding whether the May 11, 2010 work injury contributed to appellant's need for such surgery. For example, Dr. Cohen stated:

> "At this time, we have a patient who clearly has preexisting arthritis of his knee. [Appellant] may have either aggravated or accelerated his arthritic process. I

[15] *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232, 238 (1988).

[16] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[17] On May 1, 2013 Dr. Sabloff performed total left knee replacement surgery which was not authorized by OWCP.

[18] *See supra* notes 12 and 13. In a November 30, 2011 report, Dr. Smith, a Board-certified orthopedic surgeon serving as an OWCP referral physician, concluded that appellant's need for total left knee replacement was due to the end stage arthritis resulting from his prior nonwork-related injury without timely treatment and was not related to the May 11, 2010 work injury. In contrast, Dr. Sabloff indicated on December 30, 2011 that appellant's need for total left knee replacement surgery was due to his May 11, 2010 work injury which "exacerbated and deteriorated" the preexisting arthritic condition of his left knee.

> think it will be helpful to review the initial x-ray done in Florida at the time of the injury and subsequent x-rays from Dr. Sabloff's office…. I believe though that the majority of his symptoms are due to preexisting disease but cannot state so until I have been able to review his sequential x-rays performed both in Florida and by Dr. Sabloff."[19]

OWCP then provided Dr. Cohen with all the relevant medical evidence relating to appellant's left knee and requested a supplemental report regarding his request for authorization of total left knee replacement surgery. In a July 24, 2012 report, Dr. Cohen discussed the additional medical records and stated, "[Appellant's] injury may have aggravated his preexisting arthritis. It is not for me to act as a judge on this question. [Appellant] has had progressive arthritis since 2008 and it is clear that he requires a total knee replacement, but it was preexisting to some degree prior to his injury of May 2010."

The Board finds that Dr. Cohen's July 24, 2012 supplemental report did not provide adequate clarification of whether appellant's requested left total knee replacement surgery was necessitated, at least in part, by his May 11, 2010 work injury and that, after the receipt of this equivocal report, OWCP should have referred appellant to a new impartial medical specialist to consider his request for authorization of total left knee replacement surgery.[20] The Board has held that, if an impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must 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.[21]

Therefore, the Board shall set aside OWCP's September 16, 2013 decision denying appellant's request for authorization of total left knee replacement surgery and remand the case to OWCP for further development. Appellant and the case record should be referred to a new impartial medical specialist for an examination and an opinion regarding whether his request for authorization of total left knee replacement surgery should be approved. The new impartial medical specialist should be asked to indicate whether appellant sustained an aggravation of his preexisting left knee arthritis on May 11, 2010 and, if so, whether this condition has contributed to a need for total left knee replacement surgery.[22] After OWCP completes the development

[19] Dr. Smith also stated, "I believe in this case a compromise as to his cause would he appropriate and believe the appropriate ratio [would] be 60 [percent] preexisting and 40 [percent] from the injury…."

[20] Instead, OWCP requested clarifying reports from Dr. Cohen on two occasions after receiving his July 24, 2013 supplemental report.

[21] *See supra* note 16.

[22] During his oral argument before the Board, appellant asserted that OWCP did not fairly develop the evidence. He cited the multiple reports from Dr. Cohen discussed earlier in this opinion and argues that the repeated requests showed an OWCP bias against him.

Given the Board's decision in this appeal, further consideration of appellant's assertions at oral argument is unnecessary to resolve the issue presented in the case.

directed by this decision of the Board, OWCP shall issue an appropriate decision regarding appellant's surgery request.[23]

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA[24] and its implementing regulations[25] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[26] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[27]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's October 2012 claim for a schedule award for his left leg. In October 16, 2012 and July 10, 2013 letters, OWCP requested that he obtain a current report from an attending physician, which indicated that he had reached maximum medical improvement and which contained an impairment rating applying the standards of the sixth edition of the A.M.A., *Guides*. Appellant did not submit any medical report indicating that he had reached maximum medical improvement[28] or which contained an impairment rating applying the relevant standards of the A.M.A., *Guides*. In an August 4, 2013 report, Dr. Sabloff indicated that there was no motor or sensory loss observed in appellant's left leg and noted that he should continue with physical therapy. He did not provide a finding that appellant reached maximum medical improvement with respect to his left leg. Nor did Dr. Sabloff provide a rating of permanent impairment under the A.M.A., *Guides*. For these reasons, OWCP properly found that appellant had not shown that he was entitled to schedule award compensation.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

[23] Given the Board's disposition of this merit issue, it is not necessary for it to consider the nonmerit denial of reconsideration.

[24] 5 U.S.C. § 8107.

[25] 20 C.F.R. § 10.404 (1999).

[26] *Id*.

[27] FECA Bulletin No. 09-03 (issued March 15, 2009).

[28] It should be noted that appellant underwent a total left knee replacement on May 1, 2013 and continued to undergo physical therapy around the time his schedule award claim was denied.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly denied appellant's request for authorization of total left knee replacement surgery and the case is remanded to OWCP for further development. The Board further finds that OWCP properly denied appellant's schedule award claim.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board. The October 7, 2013 decision of OWCP is affirmed.

Issued: February 5, 2015
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