United States Department of Labor
Employees' Compensation Appeals Board

D.J., Appellant	)	
and	)	**Docket No. 16-0663**
	)	**Issued: October 20, 2016**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Barstow, CA, Employer	)	

Appearances:
Brett E. Blumstein, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2016 appellant, through counsel, filed a timely appeal from a January 14, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish lumbar and left knee conditions consequential to an accepted November 16, 2009 right knee injury.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted that on November 16, 2009 appellant, then a 59-year-old computer assistant, sustained a torn right medial meniscus when he tripped on a rotted restroom floor. Appellant did not stop work at the time of injury.[3]

Dr. Rana T. Pathi, an attending Board-certified orthopedic surgeon, provided reports from January 19 to May 7, 2010, noting ongoing right knee symptoms and a normal left knee. On April 15, 2010 he diagnosed "lumbar syndrome."

On March 2, 2010 appellant filed a claim for recurrence of disability (Form CA-2a) asserting that, when he stood up at work on February 5, 2010, he experienced a sharp pain in his right knee radiating upward into the lumbar spine, then downward into his left knee.

Dr. Pathi performed right knee arthroscopy on May 11, 2010, with partial medial and lateral meniscectomies, abrasion of chondromalacia, lysis of adhesions, and thermal shrinkage of a partial tear of the anterior cruciate ligament. In a May 26, 2010 report, he diagnosed multilevel lumbar and thoracic degenerative disease. Dr. Pathi explained in reports from March 14 to November 14, 2011 that appellant experienced left knee and lumbar pain following the May 11, 2010 right knee surgery as he was overcompensating for a weakened right knee.

In a February 7, 2012 letter, counsel requested that OWCP expand appellant's claim to include degenerative left knee and lumbar conditions.[4]

Appellant retired from the employing establishment on April 22, 2012.

On January 30, 2013 OWCP obtained a second opinion from Dr. Ronny G. Ghazal, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. On examination he found full motion of both knees with no instability,

[3] Appellant submitted treatment records regarding a 1985 right knee injury. He underwent a right knee arthroscopy on June 16, 1989 to repair a lateral meniscal tear. Appellant also submitted treatment records regarding June 1, 2001 injuries to the left hand and left leg. OWCP accepted a February 1, 2005 lumbar strain under File No. xxxxxx498. Imaging studies from February 21, 2003 to March 24, 2009 showed degenerative disc disease with osteophytes and mild disc bulging throughout the thoracic and lumbar spine.

[4] A July 14, 2012 magnetic resonance imaging (MRI) scan of the left knee showed severe chondromalacia and degenerative changes. July 16, 2012 lumbar imaging studies showed osteophytes at L3-4 and mild disc space narrowing at L5-S1.

arthroscopic portal scars on both knees, a normal neurologic examination of both lower extremities, a full range of motion in the lumbar spine, and no lumbar spasm or tenderness. Dr. Ghazal diagnosed bilateral patellofemoral compression syndrome, a partial tear of the right anterior cruciate ligament, status post arthroscopy of the left knee, status post multiple arthroscopies of the right knee, chronic mechanical low back pain superimposed on underlying spinal stenosis, and diffuse degenerative changes of the lumbar and thoracic spine. He explained that, while it was possible that overcompensation following right knee surgery caused a temporary increase in left knee and lumbar symptoms, this did not result in organic changes to the left knee or lumbar spine. Dr. Ghazal found that appellant did not require additional treatment. He noted that appellant continued to have residuals of the accepted right knee injury. In an April 11, 2013 addendum report, Dr. Ghazal emphasized that appellant's left knee and lumbar symptoms did not indicate any organic change in his degenerative disc disease or left knee arthritis. He explained that appellant had been symptomatic for many years prior to the accepted right knee injury. The left knee and lumbar conditions remained unrelated to the accepted right knee injury.

Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, opined on August 29, 2013 that appellant's left knee condition was possibly caused by his "extensive duties over the years," then aggravated after the right knee surgery.

In a March 13, 2014 letter, counsel again requested that OWCP expand the claim to include left knee and lumbar conditions. He submitted June 3 and 14, 2013 reports from Dr. Pathi opining that overcompensating due to the right knee injury aggravated appellant's preexisting left knee and low back symptoms. Counsel also provided an April 16, 2014 report from Dr. Tauber, in which the physician opined that prolonged standing and working in awkward positions caused a cumulative left knee condition.

By decision dated May 8, 2014, OWCP denied appellant's request to expand his claim for left knee and lumbar conditions as causal relationship was not established. It accorded the weight of the medical evidence to Dr. Ghazal, who explained that appellant's left knee and low back symptoms were unrelated to the November 16, 2009 work injury. OWCP noted that Dr. Ghazal's report outweighed Dr. Tauber's inference that appellant's left knee symptoms were due to cumulative trauma. Appellant then appealed that decision to the Board.

By decision and order issued December 18, 2014, the Board affirmed OWCP's May 8, 2014 decision, finding that Dr. Pathi and Dr. Tauber had not provided sufficient medical rationale supporting causal relationship to meet appellant's burden of proof.[5] The Board found that OWCP properly accorded the weight of the medical evidence to Dr. Ghazal.

In a February 3, 2015 letter, counsel requested reconsideration. He provided a January 22, 2015 report from Dr. Tauber. Counsel in noted that, as there was no apportionment under FECA, appellant's left knee condition was compensable as it was caused in part by "repetitive work duties which were strenuous and in part to increase weight-bearing on his left knee due to the industrial[ly]-related right knee injury."

[5] Docket No. 14-1604 (issued December 18, 2014).

By decision dated July 8, 2015, OWCP denied reconsideration, finding that Dr. Tauber's January 22, 2015 opinion was cumulative, as it was substantially similar to his August 29, 2013 and April 16, 2014 reports.

In a November 4, 2015 letter, counsel again requested reconsideration. He provided a September 22, 2015 report from Dr. Tauber, in which the physician noted that appellant's job duties required "prolonged standing, bending, twisting, and stooping," resulting in repetitive stress on both lower extremities. Dr. Tauber noted that appellant "had to do more with his left knee as a result of his right knee injury," including compensating while squatting and stooping, as well as increased weight bearing. He contended that Dr. Ghazal had not considered "the increased demands on [appellant's] left lower extremity as being consequential to the right and, in addition, [appellant's] repetitive duties clearly placed additional stresses on his left knee … and would have contributed to the actual anatomic arthritis that is present."[6]

By decision dated January 14, 2016, OWCP denied modification of its May 8, 2014 decision, finding that Dr. Tauber's September 22, 2015 report failed to explain how work factors continued to cause or contribute to appellant's left knee condition after his retirement on April 22, 2012. It found that Dr. Ghazal's report continued to represent the weight of the medical evidence.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law 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 attributable to the employee's own intentional conduct. Such consequential or secondary injury, even though nonemployment related, is compensable because it arises directly from an accepted injury.[7]

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medial 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] In a November 25, 2015 letter, counsel requested that OWCP authorize appellant to change his primary treating physician to Dr. Tauber. OWCP approved the request on December 1, 2015.

[7] *Kathy A. Kelley*, 55 ECAB 206, 210 (2004); *Debra L. Dilworth*, 57 ECAB 516, 519 (2006).

[8] *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS

Appellant claimed that he sustained left knee and lumbar conditions on or before March 2, 2010, consequential to an accepted November 16, 2009 right medial meniscal tear and two subsequent surgeries.

In support of a February 3, 2015 request for reconsideration, counsel submitted two new reports from Dr. Tauber. On January 22, 2015 Dr. Tauber opined that appellant's left knee condition was caused in part by strenuous repetitive work duties, and in part by increased weight-bearing on his left knee due to the accepted right knee injury. He reiterated on September 22, 2015 that appellant's left knee condition was due to repetitive musculoskeletal stress at work and overcompensation for a weakened right knee. Dr. Tauber contended that Dr. Ghazal did not consider either factor. However, he failed to explain his medical reasoning supporting causal relationship. Dr. Tauber did not specify the pathophysiologic effects of appellant's work activities or postsurgical gait changes on his left knee. In the absence of such rationale, Dr. Tauber's report is insufficient to meet appellant's burden of proof.[9] Additionally, he did not diagnose an objective lumbar condition or explain how and why appellant's symptoms were related to the right knee injury. Therefore, Dr. Tauber's opinion is insufficient to meet appellant's burden of proof regarding the claimed lumbar condition.[10]

Dr. Tauber also contended that Dr. Ghazal did not consider repetitive stress or overcompensation in his report. The Board notes, however, that Dr. Ghazal provided an extensive explanation as to why compensating for a weakened right knee would not have caused the claimed left knee condition. He also based his opinion on a complete medical and factual history, which included a description of appellant's work duties.

On appeal counsel contends that there is a conflict of medical opinion between Dr. Ghazal, for the government, and Dr. Tauber, for appellant, regarding whether the accepted right knee condition caused consequential left knee and lumbar conditions.[11] The Board finds, however, that there is no conflict of medical opinion, as Dr. Ghazal's opinion continues to carry the weight of the evidence over those of Dr. Tauber.[12]

The Board finds that appellant did not submit sufficient rationalized medical evidence supporting a causal relationship between the claimed left knee and lumbar conditions and the accepted November 16, 2009 right knee condition. OWCP's January 14, 2016 decision denying the claim is therefore proper under the law and facts of this case.

[9] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[10] *Id.*

[11] Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict. 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[12] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence. *Delphia Y. Jackson*, 55 ECAB 373 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish that he sustained lumbar and left knee conditions consequential to an accepted November 16, 2009 right knee injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 14, 2016 is affirmed.

Issued: October 20, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board