United States Department of Labor
Employees' Compensation Appeals Board

P.F., Appellant	)	
and	)	**Docket No. 16-0693**
	)	**Issued: October 24, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Warsaw, IN, Employer	)	

Appearances:
Joseph E. Allman, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 24, 2016 appellant, through counsel, filed a timely appeal from an August 31, 2015 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 case.

ISSUE

The issue is whether OWCP properly denied authorization for right knee arthroplasty.

[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.*

FACTUAL HISTORY

On March 18, 2014 appellant, then a 47-year-old rural letter carrier filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2014, after deicing her mail truck and delivering mail, she returned to her office and experienced severe bilateral knee pain and swelling.[3] She indicated that she had previously fractured her right knee at work on January 15, 2009 and that her left knee was damaged due to overcompensating for her right knee injury.[4] OWCP accepted appellant's claim for post-traumatic arthritis of the right lower leg. Appellant worked intermittently thereafter until she stopped completely on June 20, 2014.

The record contains treatment reports from Dr. Gregory M. Sassmannshausen, a Board-certified orthopedist, from March 18, 2009 to April 30, 2014, for bilateral knee pain related to repetitive standing and walking required at her job as a letter carrier. On April 9, 2009 Dr. Sassmannshausen performed a right knee arthroscopy with partial medial meniscectomy and diagnosed right knee posterior horn medial meniscal tear. On April 19, 2010 he performed a right knee arthroscopy with loose body removal and chondroplasty of the patellofemoral lateral compartment. A magnetic resonance imaging (MRI) scan of the right knee dated April 23, 2014, revealed tricompartmental degenerative changes most advanced in the patellofemoral compartment.

Appellant came under the treatment of Dr. Steven Fisher, a Board-certified orthopedist, on May 15 and 22, 2014, for post-traumatic arthritis of the right knee. Dr. Fisher noted that she had sustained a work-related injury to her right knee in 2009 and underwent arthroscopic surgery in 2009 and 2010. He noted giving injections and oral medications. Dr. Fisher diagnosed right knee degenerative arthritis secondary to anserine bursitis and neuroma of the infrapatellar branch of the saphenous nerve. He noted conservative modalities failed and recommended a total right knee arthroplasty.

On May 27, 2014 Dr. Fisher submitted a general medical and surgical authorization request for a right knee arthroplasty. He noted that a right knee MRI scan dated April 23, 2014 revealed tricompartmental degenerative arthritis with grade 2 and 3 chondromalacia in the medial and lateral compartments. Dr. Fisher noted that she had previous arthroscopy in 2009 and 2010, which documented cartilage loss and removal of loose bodies from the knee. Appellant continued to complain of disabling pain consistent with these findings and was treated with oral anti-inflammatories and cortisone injections which did not alleviate her pain. Dr. Fisher opined that she continued to have residuals of her work-related conditions which precluded her from working as a letter carrier. He further opined that appellant could work in a

[3] In a memorandum dated June 13, 2014, OWCP noted that appellant consistently complained of bilateral knee pain both before and after the January 13, 2014 incident relating her condition to repetitive duties of delivering mail daily. Based on appellant's statements, it developed her claim as an occupational disease rather than a traumatic injury claim.

[4] On January 20, 2009 appellant filed a traumatic injury claim alleging that on January 15, 2009 while delivering mail she stepped onto a porch and twisted her right knee and fell backward hitting her head, claim number xxxxxx173. OWCP accepted her claim for concussion, sprain of neck, contusion of the right knee and lower right leg and torn right meniscus. It authorized April 9 and 19, 2010 right knee arthroscopies. This claim was consolidated with the current claim before the Board, claim number xxxxxx653.

sedentary capacity with the ability to stand as needed. Dr. Fisher recommended a total knee arthroplasty to alleviate her pain long-term.

Appellant filed a Form CA-7, claim for compensation for total disability for the period beginning June 20, 2014. On September 4, 2014 OWCP denied her claim. Appellant requested an oral hearing.

In a decision dated February 19, 2015, a hearing representative reversed the September 4, 2014 OWCP decision. The hearing representative noted that Dr. Fisher had provided sufficient evidence that appellant could not perform unrestricted duty due to her accepted right knee condition and therefore she was entitled to compensation beginning June 20, 2014.[5] The hearing representative instructed OWCP to combine claim numbers xxxxxx173 and xxxxxx653 and develop the case with regard to her request for a right total knee arthroplasty.

On March 4, 2015 OWCP referred appellant to Dr. Nathan A. Fogt, an osteopath and Board-certified orthopedist, for a second opinion examination, regarding the status of her accepted condition and the need for a right knee replacement. In a March 26, 2015 report, Dr. Fogt indicated that he reviewed the records provided and provided results on examination. He noted Dr. Sassmannshausen, on April 9, 2009, had performed a right knee arthroscopy with partial medial meniscectomy and diagnosed right knee posterior horn medial meniscal tear and mild grade 2 chondromalacia changes of the patella and on April 26, 2010 performed an arthroscopy finding a loose body. Dr. Fogt noted an April 23, 2014 right knee MRI scan showed tricompartmental degenerative changes most advanced in the patellofemoral compartment. He noted findings of a nonantalgic gait with a cane, no focal motor or sensory deficits and negative straight leg raising bilaterally. With regard to the right knee appellant had extremely hyperintense pain response to even the lightest touch, she showed withdrawal behavior when one moved towards her knee, there was no effusion, the collateral ligaments appear to be intact, and range of motion was 5 to 120 degrees. Dr. Fogt opined that she had active residuals from the accepted conditions based on the review of the records and examination. He opined that appellant was unable to return to work secondary to her hyperactive pain response. Dr. Fogt noted that her prognosis was extremely guarded and he would be quite hesitant to proceed with a total knee arthroplasty under these conditions. He opined that the April 2014 right knee MRI scan showed grade 3 changes at the patellofemoral joint, but the remainder of the articular surface appeared to be relatively well preserved. Dr. Fogt further noted that given appellant's significant pain response to the lightest touch, an extensive procedure, such as a total knee arthroplasty, in this setting would be fraught with potential complications. He recommended a pain management trial before any attempt at surgery. Dr. Fogt noted that appellant could not perform her letter carrier duties, but she could work in a sedentary position.

OWCP found that a conflict of medical opinion existed between Dr. Fisher, appellant's treating physician, who diagnosed work-related tricompartmental degenerative arthritis in the right knee with grade 2 and 3 chondromalacia in the medial and lateral compartments, and disabling pain and recommended a total knee arthroplasty; and Dr. Fogt, an OWCP referral

[5] OWCP paid wage-loss compensation beginning June 20, 2014.

physician who opined that appellant had active residuals from the accepted conditions, but given her significant pain response to the lightest touch she was not a candidate for the proposed right total knee arthroplasty.

Appellant submitted a July 2, 2015 letter of medical necessity from Dr. Fisher with regard to her left knee. Dr. Fisher diagnosed post-traumatic arthritis, degenerative changes, and severe pain. He noted changes on appellant's MRI scan, which reveal edema in the subchondral bone and opined that she was a candidate for a total knee replacement.

To resolve the conflict OWCP, on April 15, 2015, referred appellant to a referee physician, Dr. Christopher R. Balint, an osteopath and a Board-certified orthopedist. In a July 30, 2015 report, Dr. Balint noted reviewing the record, including the history of her work injury. He noted that her history was significant for two arthroscopies of the right knee, one in April 2009 which showed patellofemoral chondral changes along with the medial meniscus tear and another in April 2010 which revealed the grade 2 and two large loose chondral bodies in the medial compartment that were removed. The April 19, 2010 operative report revealed significant advancement in chondral changes primarily in the lateral compartment in one year. Right knee examination revealed range of motion similar to the left knee. The right knee was extremely stable to varus and valgus stress testing. Appellant showed extreme hypersensitivity even to touch about the knee and the medial, lateral, and patella knee was stable. She was able to stand, but she was very apprehensive of bearing full weight onto the right knee. Dr. Balint opined that appellant continued to have active residuals of her right knee condition. Appellant was extremely hypersensitive to any touch or palpation about the entire right knee with significant pain with any type of ambulation or standing. However, Dr. Balint noted that she had no effusion on examination. He noted that at the time of arthroscopy in April 2009, there were no signs of any chondral abnormalities. A March 2010 MRI scan revealed extensive chondral surface irregularity, loss of the medial patella facet, and partial thickness cartilage loss along the posterior aspect of the lateral femoral condyle. Dr. Balint opined that, based on his examination and findings, he did not believe that surgery was warranted as a result of the January 2009 work injury. He based his opinion on the fact that, since the first MRI scan of March 2009 to the arthroscopy dictation of April 2009, there appeared to be advancement and changes intra-articularly primarily to the lateral compartment over one year that were not noted at time of arthroscopy. Dr. Balint opined that because of appellant's hypersensitivity to the right knee, a total knee replacement could present great issues with regard to pain control and postoperative pain management. He recommended conservative management with cortisone injections as warranted, possibly viscosupplementation, oral anti-inflammatories, physical therapy, and nonsteroidal anti-inflammatories. Dr. Balint noted that due to appellant's subjective pain complaints regarding her right knee and, with increased discomfort to her left knee due to overcompensation, he did not believe that she could work as a letter carrier. He opined that sedentary work with no restrictions on the arm would be appropriate. Dr. Balint opined that appellant's condition progressed with advancing patellofemoral symptoms from the March 2009 MRI scan and the operative notes indicating that there was already obvious patellofemoral chondromalacia at that time which had advanced since that time.

In a decision dated August 31, 2015, OWCP found that Dr. Balint's opinion represented the weight of medical evidence and denied authorization for the total right knee arthroplasty.

LEGAL PRECEDENT

Section 8103 of FECA 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, or the period of disability, or aid in lessening the amount of monthly compensation.[6] While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[7]

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 OWCP's authority being 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] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[10] In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[11]

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.[12]

ANALYSIS

OWCP accepted that appellant sustained employment-related post-traumatic arthritis of the lower leg, concussion, sprain of neck, contusion of the right knee and lower right leg, and torn right meniscus. Arthroscopic surgery was authorized on April 9, 2009 and April 19, 2010. On May 27, 2014 Dr. Fisher requested authorization for a total right knee arthroplasty. OWCP determined that a conflict in medical opinion existed between appellant's attending physician,

[6] 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[7] *Kennett O. Collins, Jr*. 55 ECAB 648 (2004).

[8] *See D.K.*, 59 ECAB 141 (2007).

[9] *Minnie B. Lewis*, 53 ECAB 606 (2002).

[10] *M.B.*, 58 ECAB 588 (2007).

[11] *R.C.*, 58 ECAB 238 (2006).

[12] 5 U.S.C. § 8123(a); *Guiseppe Aversa*, 55 ECAB 164 (2003).

Dr. Fisher, who diagnosed work-related tricompartmental degenerative arthritis in the right knee, chondromalacia in the medial and lateral compartments, and disabling pain and recommended a total knee arthroplasty; and Dr. Fogt, an OWCP referral physician, who opined that appellant had active residuals from the accepted conditions, but given her significant pain response she was not a candidate for the proposed right total knee arthroplasty. Consequently, it referred her to Dr. Balint to resolve the conflict.

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Balint, the impartial specialist, who examined appellant, reviewed the medical evidence, and found that the total right knee arthroplasty was not medically warranted. As noted, for a surgical procedure to be authorized, a claimant must show that the surgery is for a condition causally related to a work injury and that it is medically warranted.

In a July 30, 2015 report, Dr. Balint reviewed appellant's history and reported findings. He noted her history, including her two right knee arthroscopies. Dr. Balint noted that examination revealed that the right knee was extremely stable to varus and valgus stress testing with no effusion, although appellant showed hypersensitivity to touch. He opined that she continued to have active residuals of her right knee condition with significant pain with any type of ambulation or standing. Dr. Balint noted that, at the time of arthroscopy in April 2009, there were no signs of any chondral abnormalities, but that a March 2010 MRI scan revealed extensive chondral surface irregularity, loss of the medial patella facet, and partial thickness cartilage loss of the lateral femoral condyle. He opined that, based on his examination and findings, the proposed right knee arthroplasty was not warranted as a result of the work injury. Dr. Balint based his opinion on the fact that, since the first MRI scan of March 2009 and the arthroscopy dictation of April 2009, there appeared to be advancement and changes intra-articularly primarily to the lateral compartment over one year that were not noted at time of arthroscopy. He opined that, because of appellant's right knee hypersensitivity, a total knee replacement could present great issues with regard to her pain control and postoperative pain management. Dr. Balint recommended conservative and nonsurgical treatment.

In situations where the case is referred to an impartial medical specialist for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13] The Board finds that Dr. Balint provided a well-rationalized opinion based on a complete background, his review of the accepted facts, the medical record, and his examination findings. Dr. Balint's opinion that the total right knee arthroplasty was not medically warranted is entitled to special weight and represents the weight of the evidence.[14]

The only limitation on OWCP's authority is approving or disapproving service under FECA is one of reasonableness.[15] In the instant case, appellant requested surgery. OWCP obtained an impartial medical examination through Dr. Balint who clearly found the surgery not

[13] *Guiseppe Aversa, id.*

[14] *Id.*

[15] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

warranted. It therefore had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.

On appeal counsel disagrees with the decision denying appellant's request for right knee arthroplasty. He asserts that it was unreasonable for her to be examined by a second opinion physician as her long-treating physician determined the surgery was appropriate. However, OWCP has the discretion to have a claimant submit to an examination by a physician designated or approved by OWCP after the injury and as frequently and at the times and places as may be reasonably required.[16] There is no evidence showing that the referral to Dr. Fogt was unreasonable. Counsel further asserts that the second opinion physician's report was not of sufficient weight to create a conflict of opinion and that the referee physician's opinion is incomplete as he did not have MRI scan films or x-ray films to examine before rendering his opinion. As explained the record supports that Dr. Fogt clearly disagreed with Dr. Fisher with regard to whether the requested surgery was warranted. This necessitated appellant's referral to an impartial specialist under 5 U.S.C. § 8123(a). Dr. Balint's report shows that he reviewed the medical evidence of record and found the proposed surgery not causally related to the work injury and medically unwarranted based on his examination findings and a review of the record. OWCP properly acted properly within its discretionary authority to deny authorization for the requested surgery. Therefore, the Board finds that OWCP did not abuse its discretion under section 8103 in denying approval of right knee surgery.

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 OWCP properly exercised its discretion when it denied authorization for the recommended surgical procedure to appellant's right knee.

[16] *William B. Webb*, 56 ECAB 156 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 31, 2015 is affirmed.

Issued: October 24, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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