

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

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**B.L., Appellant**

**and**

**U.S. POSTAL SERVICE, MARGATE POST  
OFFICE, Margate City, NJ, Employer**

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**Docket No. 15-1216  
Issued: September 22, 2016**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 7, 2015 appellant, through counsel, filed a timely appeal from a March 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 right hip replacement surgery.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision and order dated September 21, 2011,<sup>3</sup> the Board affirmed a July 22, 2010 OWCP decision finding that appellant had failed to establish more than a 22 percent permanent impairment of the left upper extremity and a 12 percent permanent impairment of the right lower extremity. The Board further found that OWCP had used the proper pay rate in calculating appellant's compensation. The law and facts of the case as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on January 26, 2006 appellant, then a 54-year-old custodian, sustained a right medial meniscus tear when he stepped on a pallet jack while dumping trash and fell, twisting his right knee. Appellant underwent right knee arthroscopy on February 14, 2006.<sup>4</sup> OWCP also accepted that on November 30, 2007 appellant sustained a left shoulder sprain, left rotator cuff strain/sprain, a lumbar strain, and aggravation of a torn right medial meniscus when his right knee gave way while moving a rolled floor mat from the employing establishment's lobby to hang it on a railing. Appellant asserted that, when he fell to the floor, he injured his left shoulder and right knee, twisted his low back, and injured his "pelvis." Following the injuries, he returned to modified-duty work for intermittent periods.

A November 30, 2007 right hip x-ray demonstrated shortening of the right femoral neck without obvious fracture or dislocation, possibly due to a congenital or developmental cause.

Dr. Glenn Zuck, an attending osteopath Board-certified in orthopedic surgery, performed a repeat right knee arthroscopy on April 1, 2008, with partial medial and lateral meniscectomies, chondroplasty, and debridement of a partial anterior cruciate ligament tear. OWCP authorized the procedure. It also authorized an arthroscopic left shoulder rotator cuff repair, performed on June 13, 2008.<sup>5</sup>

Dr. Arthur Becan, an attending osteopathic physician, provided a February 6, 2009 impairment rating. He noted chronic pain and instability in the right knee, a noticeable right lower extremity limp, and that appellant was unable to heel or toe walk.

Appellant had filed for a schedule award and by decision dated January 14, 2010 and affirmed on July 22, 2010,<sup>6</sup> OWCP granted a 12 percent impairment of the right lower extremity

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<sup>3</sup> Docket No. 11-0213 (issued September 21, 2011).

<sup>4</sup> OWCP accepted the claim under File No. xxxxxx381. It doubled File No. xxxxxx381 with the present claim, File No. xxxxxx985.

<sup>5</sup> In a September 4, 2008 report, Dr. Fernando Delasotta, an attending Board-certified neurosurgeon, diagnosed L4-5 spondylolisthesis with left-sided radiculopathy.

<sup>6</sup> OWCP accepted a recurrence of disability commencing June 10, 2010 as the employing establishment had no work available within appellant's medical limitations. It again accepted a recurrence of disability commencing October 10, 2012 due to unavailability of light-duty work.

due to moderate anterior cruciate laxity, and a 22 percent impairment of the left upper extremity due to sequelae of the rotator cuff tear.<sup>7</sup>

In a November 22, 2010 report, Dr. Zuck noted appellant's complaints of right hip pain which had begun three days previously while walking in his home. He obtained right hip x-rays which demonstrated "changes about the humeral head and proximal femur consistent with his preexisting diagnosis as a child [of] Legg-Calve-Perthes disease." Dr. Zuck diagnosed right hip pain and referred appellant to his family physician for further evaluation.

In a November 15, 2011 letter, counsel requested that OWCP authorize total right knee and right hip arthroplasties.

Dr. Alvin Ong, an attending Board-certified orthopedic surgeon, submitted a November 3, 2011 report relating appellant's history of a 2006 occupational right knee injury when he tripped and fell over a jack, and the 2007 occupational right knee injury sustained when he fell "while pulling a rug out." In both incidents, appellant asserted that he injured his right hip when he fell. Dr. Ong also noted the two right knee arthroscopies previously performed by Dr. Zuck. On examination, he found restricted motion of the right hip in all planes, a 0.25 inch leg length discrepancy with the right leg shorter than the left, significant varus misalignment of the right knee, and a right knee effusion. Dr. Ong obtained right hip x-rays showing significant dysplasia "with evidence of previous Legg-Perthes syndrome," and right knee x-rays demonstrating end stage, bone on bone arthritis in the medial compartment. He diagnosed right hip dysplasia with Legg-Perthes syndrome "accelerated and exacerbated by falls noted above." Dr. Ong recommended a right total hip replacement. He also diagnosed post-traumatic arthritis of the right knee, "100 percent causally related to [appellant's] injuries from the fall in 2006 as well as reinjury in 2007" and the arthroscopic procedures. Dr. Ong recommended a total right knee replacement.

On January 3, 2012 OWCP obtained a second opinion from Dr. Kenneth P. Heist, an osteopath Board-certified in orthopedic surgery. Dr. Heist related appellant's complaints of right knee instability, right hip pain, and stiffness. On examination, he found restricted right hip motion in all planes and degenerative arthritis of both knees. Dr. Heist opined that appellant was "suffering from degenerative joint disease that has been accelerated by his employment."

An OWCP medical adviser reviewed the medical record on June 12, 2012 and recommended approval of the requested right knee arthroplasty. He requested that OWCP obtain additional information about appellant's Legg-Perthes disease and any affect the accepted injuries may have had on its progression.<sup>8</sup>

On June 13, 2012 OWCP expanded appellant's claim to include degenerative arthritis of the right knee.

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<sup>7</sup> Counsel then filed an appeal with the Board, resulting in the September 21, 2011 decision and order. *Supra* note 3.

<sup>8</sup> In a June 25, 2012 letter, OWCP requested that Dr. Heist explain whether appellant's claim should be expanded to include right hip dysplasia with Legg-Perthes syndrome, and whether the November 30, 2007 injury and x-rays warranted a right hip arthroplasty. It is unclear from the record if Dr. Heist responded to this request.

In a June 25, 2012 letter, OWCP requested that appellant submit a report from his attending physician explaining if the accepted occupational injuries caused or aggravated the right hip condition. It also requested the November 30, 2007 and November 3, 2011 hip x-ray images. OWCP afforded appellant 30 days to submit such evidence. In response, appellant provided a July 10, 2012 report from Dr. Ong, opining that the accepted January 2006 incident caused a right hip injury. Dr. Ong explained that appellant's Legg-Perthes disease of the right hip was quiescent until the 2006 injury, with subsequent pain and immobility. He found that appellant's right hip problems were "100 percent related to injury sustained by way of exacerbation and acceleration. The fall made [appellant's] hip symptoms worse and thus [he] believe[d] that a hip replacement is required" and was "causally related by the work[-]injury sustained."

In an April 9, 2013 report, Dr. Ong opined that appellant injured his right hip in an occupational fall, causing and accelerating right hip, and knee conditions, necessitating a total right hip replacement. He found appellant totally disabled due to severe right hip pain and immobility. On May 21, 2013 Dr. Ong reiterated that the occupational injuries caused post-traumatic right hip and knee conditions, and an acute exacerbation of underlying Legg-Perthes disease.

On June 7, 2013 OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon. Dr. Askin reviewed the medical record and a statement of accepted facts. He noted that appellant had insulin dependent diabetes mellitus and was obese. On examination, Dr. Askin observed a right-sided limp, a right knee effusion, medial compartment osteoarthritis of the right knee, and limited right hip motion. He noted that appellant had arthroscopic portal scars on his right shoulder, with no residual abnormalities related to the June 2008 rotator cuff repair. Dr. Askin opined that appellant's degenerative arthritis was caused primarily by morbid obesity, because the extra weight was "continuously injurious, and significantly more so than anything that happened to [appellant] at any time during the course of employment." He explained that although appellant attributed "his problems to specific recalled events at work ... that is not the impairment or disability that is most troubling him."

By decision dated June 21, 2013, OWCP denied appellant's request to authorize a right hip arthroplasty, finding that the medical evidence failed to establish the causal relationship asserted. It accorded the weight of the medical evidence to Dr. Askin, who opined that appellant's right hip condition was due only to obesity and not the accepted injuries.

In a June 25, 2013 letter, counsel requested a hearing, held on October 23, 2013. At the hearing, appellant asserted that Dr. Askin had failed to examine his right hip and would not accept his explanation that the June 2008 rotator cuff repair involved the left shoulder and not the right. Counsel asserted that Dr. Askin's opinion was insufficient to represent the weight of the medical evidence because he did not perform a thorough or accurate examination, and provided an equivocal analysis of the etiology of appellant's right hip condition.

By decision dated and finalized December 6, 2013, an OWCP hearing representative affirmed the June 21, 2013 decision and denied authorization for the requested right hip arthroplasty. The hearing representative found that Dr. Askin's report continued to represent the weight of the medical evidence.

In a May 20, 2014 letter, counsel requested reconsideration. He submitted reports from Dr. Ong dated from January 7, 2014 through January 29, 2015, opining that appellant's right hip condition was exacerbated and accelerated by the accepted injuries. In a May 8, 2014 report, Dr. Ong explained that the accepted injuries "led to an aggravation and acceleration and is 100 percent causally related to [appellant's] need for right hip replacement at this time." He explained that the January 26, 2006 injury incident where appellant fell over a jack at work exacerbated quiescent Legg-Perthes disease, precipitating degeneration, and eventual immobility of the right hip.

By decision dated March 17, 2015, OWCP affirmed the December 6, 2013 decision, finding that Dr. Ong's additional reports were insufficiently rationalized to outweigh Dr. Askin's opinion.

### **LEGAL PRECEDENT**

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."<sup>9</sup>

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.<sup>10</sup> The only limitation on OWCP's authority is that of reasonableness.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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<sup>9</sup> 5 U.S.C. § 8103.

<sup>10</sup> *Vicky C. Randall*, 51 ECAB 357 (2000).

<sup>11</sup> *Lecil E. Stevens*, 49 ECAB 673 (1998).

<sup>12</sup> *Rosa Lee Jones*, 36 ECAB 679 (1985).

<sup>13</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>14</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

## ANALYSIS

OWCP accepted that appellant fell at work on January 26, 2006 and again on November 30, 2007, causing a right medial meniscal tear, degenerative arthritis of the right knee, a lumbar strain, a left rotator cuff strain/sprain, and left shoulder sprain. Appellant underwent February 14, 2006 and April 1, 2008 authorized right knee arthroscopies, and a June 13, 2008 arthroscopic left rotator cuff repair. OWCP also authorized a proposed total right knee arthroplasty, but denied authorization for a right hip replacement. The Board finds, however, that the case is not in posture for a decision.

In support of his request, appellant submitted reports from Dr. Ong, a Board-certified orthopedic surgeon, supporting a causal relationship between the accepted injuries and the need for a right hip arthroplasty. In his November 3, 2011 report, Dr. Ong provided a detailed, accurate history of injury and treatment. He opined that the 2006 and 2007 falls accelerated and exacerbated preexisting right hip dysplasia with Legg-Perthes syndrome. Dr. Ong opined on April 9, 2013 that the injuries also accelerated degenerative arthritis, causing severe right hip pain, and immobility. On May 18, 2014 he found that the January 26, 2006 trip and fall exacerbated quiescent Legg-Perthes disease, precipitating degeneration of the right hip, necessitating a total hip replacement.

OWCP afforded the weight of the medical evidence to Dr. Askin, a Board-certified orthopedic surgeon and second opinion physician, who attributed appellant's condition to nonoccupational factors. In his June 7, 2013 report, Dr. Askin opined that appellant's degenerative arthritis was primarily due to obesity. He asserted that although appellant attributed "his problems to specific recalled events at work ... that is not the impairment or disability that is most troubling him."

Dr. Ong opined that the accepted occupational injuries were competent to accelerate underlying Legg-Perthes disease, dysplasia, and degenerative disease of the right hip. In contrast, Dr. Askin found that appellant's right hip condition was due to obesity, and not any employment incident. Both physicians are Board-certified orthopedic surgeons, specialists who have reached opposite conclusions as to the etiology of appellant's right hip degeneration. The Board therefore finds that there is a conflict of medical opinion.

As there is an outstanding conflict of medical opinion, the case will be remanded to OWCP for appointment of an impartial medical examiner.<sup>15</sup> On remand of the case, OWCP shall prepare an updated statement of accepted facts, and refer it, appellant, and the medical record to an impartial medical examiner, to resolve the conflict of medical opinion between Dr. Ong, for appellant, and Dr. Askin, for the government. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

On appeal, counsel contends that Dr. Ong's reports were sufficiently thorough and well rationalized to represent the weight of the medical evidence. Alternatively, counsel asserts a conflict between Dr. Askin and Dr. Ong, requiring resolution by an impartial medical examiner.

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<sup>15</sup> 5 U.S.C. § 8123(a); *Delphia Y. Jackson, id.*; *J.P.*, Docket No. 14-0685 (issued July 23, 2014).

As stated above, the case will be remanded to OWCP for additional development to resolve the conflict between Dr. Ong and Dr. Askin.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 17, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for additional development consistent with this decision and order.

Issued: September 22, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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