

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

M.M., Appellant)

and)

**DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION,
Madisonville, KY, Employer**)

**Docket No. 17-0960
Issued: November 14, 2017**

Appearances:

Ronald K. Bruce, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 31, 2017 appellant, through counsel, filed a timely appeal from a February 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 has met his burden of proof to establish a right knee condition causally related to factors of his federal employment.

On appeal counsel contends that a September 23, 1987 medical report of Dr. James Donley, an attending Board-certified orthopedic surgeon, and May 21, 2013 report of Dr. David W. Gaw, another attending Board-certified orthopedic surgeon, are sufficient to establish that appellant's degenerative arthritis of the right knee and resultant disability are due to his federal employment.

FACTUAL HISTORY

On February 11, 2016 appellant, then a 67-year-old supervisory mine safety and health specialist (electrical), filed an occupational disease claim (Form CA-2) for right knee degenerative arthritis under the current claim, File No. xxxxxx239.³ He alleged that he first became aware of his right knee condition and its relationship to his federal employment on September 23, 1987. Appellant did not submit any additional evidence.

In a February 29, 2016 letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant responded to OWCP's inquiries on March 25, 2016 with a full account of his employment history since 1966. He was employed at two coal companies from 1966 to 1975 where he worked as an underground electrician and chief electrician, eight hours a day, five days a week. As a chief electrician, appellant worked in a bent over or stooped position and on his knees. He began working with the employing establishment in 1975 as an electrical inspector. From 1982 to 1987, appellant returned to the coal mining industry working for Pittsburgh and Midway Mining Company as a master electrician in surface mining, eight hours a day, six or seven days a week. This position involved climbing and bending. In 1987, appellant returned to work at the employing establishment as an electrical inspector. He became an electrical supervisor in 2011 and retired from the employing establishment on August 3, 2015. As an electrical inspector appellant worked underground in the coal mines five hours a day, five days a week. He also worked in a bent over or stooped position. Appellant had to get on his knees and

³ The Board notes that, under a prior traumatic injury claim (Form CA-1) assigned File No. xxxxxx912, OWCP accepted that on September 18, 1987 appellant, then a coal mine inspector, sustained right knee tendinitis when he stepped on a coal block while inspecting a mine. In a May 23, 2013 decision, OWCP denied appellant's claim for a schedule award and a recurrence of disability as the medical evidence did not establish that his need for medical treatment was due to a worsening of his accepted work-related condition, without intervening cause. By decision dated February 4, 2014, an OWCP hearing representative affirmed this decision. She noted that appellant appeared to be alleging a new injury, right knee arthritis that necessitated surgery in 2007, for which he should pursue an occupational disease claim. In a November 24, 2014 decision, the Board affirmed the hearing representative's February 4, 2014 decision, finding that appellant had failed to meet his burden of proof to establish that his advanced degenerative arthritis in the right knee, for which he underwent a total right knee replacement on November 13, 2007, was causally related to the accepted September 18, 1987 work-related right knee injury. *M.M.*, Docket No. 14-1034 (issued November 24, 2014). The Board stated that appellant may pursue an occupational disease claim for this injury.

crawl at times. In the summer months, he performed inspections on the surface which required a lot of climbing. As an electrical supervisor, appellant worked underground once a week for five hours. He related that this required the same type of physical activity he had performed as an electrical inspector. Appellant claimed that on September 23, 1987 he learned from Dr. Donley that he had degenerative arthritis in his right knee related to an injury he sustained while working at the employing establishment. Dr. Donley advised the employing establishment that the stresses of his work would be a problem for his knee in the future. Appellant later experienced worsening knee problems and underwent right total knee replacement on November 13, 2007. He returned to work following surgery and continued to experience knee problems.

Appellant provided a May 21, 2013 report from Dr. Gaw who noted a history of appellant's September 18, 1987 right knee injury due to crawling into an underground coal mine. Dr. Gaw also noted that appellant was involved in a 1975 motorcycle accident which resulted in a bruised right knee and an apparent fractured right leg. He began working as an underground coal miner in 1969 and had to bend over or squat as he worked in an area four to five feet high. Appellant was required to sit about one-third of the time and to stand usually in a stooped over or flexed position or crawl on his knees the remainder of the time. He had knee problems after performing his coal mine work activities and on November 13, 2007 had a right total knee replacement. After this surgery, appellant knee pain was much better and he returned to underground work as a coal mine inspector. He continued to have trouble with his right knee going down stairs and with twisting activities.

Dr. Gaw reviewed appellant's medical records, reported examination findings, and diagnosed postoperative right total knee replacement. He advised that appellant did not require any further surgery or diagnostic procedures. Dr. Gaw opined that, based on the history given and the described work, it was more likely than not that his total knee replacement was necessitated by his underground coal mining work for 25 plus years. He related that these work activities were either a significant factor in the development of arthritis in the knee or aggravated an arthritic condition. Dr. Gaw related, however, that these work activities were most likely a major factor for the need for surgery. He advised that appellant had 25 percent permanent impairment of the right leg or 10 percent permanent impairment of the whole person under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).⁴ Dr. Gaw also advised that he had 37 percent permanent impairment of the right leg or 15 percent permanent impairment of the whole person under the fifth edition of the A.M.A., *Guides*.⁵

By decision dated May 12, 2016, OWCP denied appellant's occupational disease claim. It found that Dr. Gaw did not provide a rationalized medical opinion that differentiated the effects of the established factors of employment from the preexisting degenerative arthritis knee condition. OWCP determined that his report should have discussed the nature of the preexisting degenerative right knee arthritis condition, including its natural or traditional course, and how the condition may have been affected by the reported work factors with reference to medical records including diagnostic reports.

⁴ 6th ed. 2009.

⁵ 5th ed. 2001.

In a letter dated May 25, 2016, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

Appellant submitted medical evidence from Dr. Joseph D. Chenger, a Board-certified orthopedic surgeon, which addressed his bilateral knee condition and permanent impairment. In clinical records dated September 4, 2007 and August 13, 2008, Dr. Chenger noted a history of appellant's medical, social, and family background. He reported findings on physical and x-ray examinations of both knees. In the September 4, 2007 clinical record, Dr. Chenger provided an impression of advanced degenerative arthritis of the right knee,⁶ primarily involving the lateral compartment. In the August 13, 2008 clinical record, he noted that appellant was doing quite well eight months status post right knee surgery. Dr. Chenger provided an impression of normal right total knee replacement. He advised appellant to continue with his current activities. In a November 13, 2007 report, Dr. Chenger described the right total knee replacement he performed on that date based on clinical and x-ray evidence of advanced degenerative arthritis. In a September 20, 2011 report, he noted that appellant was status post right total knee replacement. Dr. Chenger determined that he had 37 percent permanent impairment of the right lower extremity and 15 percent permanent impairment of the whole person based on the A.M.A., *Guides*.

In a September 23, 1987 right knee x-ray report, Dr. Brooks A. Horsley, a Board-certified radiologist, found that the knee was normally aligned at that time and that there was no fracture or destructive lesion. He also found dramatic osteophyte formation in the lateral compartment of the knee with some degenerative change present in the medial and patella femoral compartments.

In a September 23, 1987 treatment note, Dr. Donley noted a history that on September 18, 1987 appellant had developed pain and tenderness in his right knee while crawling around underground coal mines as a mine inspector. He indicated that appellant previously had degenerative arthritis of the knee. Dr. Donley provided findings on examination of the right knee and recommended an extra padded knee brace to protect against trauma. He advised that appellant could return to his activities, but related that the stresses of the type of work activity on his knee would be a problem for him in the future. Dr. Donley related that surgery was not indicated at that time. In a surgeon's report dated September 23, 1987, he reiterated appellant's history of injury. Dr. Donley reviewed x-rays and diagnosed tendinitis in the anterior aspect of the knee. He responded "yes" to the question whether the accident was the only cause of appellant's condition. Dr. Donley advised that he also had preexisting degenerative arthritis in the right knee and unstable knee ligaments. He responded "yes" to the question whether appellant had any physical impairment due to the previous accident or disease. Dr. Donley advised that no further treatment was needed, but indicated that he may require periodic padding or brace for padding. He indicated that appellant maintained his regular work activities. In an undated attending physician's report (Form CA-20), Dr. Donley restated appellant's history of injury and preexisting right knee condition. He also reiterated his prior diagnosis of tendinitis in the anterior aspect of the knee. Dr. Donley placed a checkmark in the box marked "yes" indicating that appellant's diagnosed condition was caused or aggravated by

⁶ The Board notes that it appears that Dr. Chenger inadvertently related that appellant had advanced degenerative arthritis in the left knee rather than in the right knee as he subsequently performed right total knee replacement on November 13, 2007 for having this condition in the right knee.

the described work activity. He again maintained that the stresses of the type of work performed by appellant would undoubtedly cause a problem for his knee in the future.

Treatment notes dated March 17, 1998 and March 31, 2008 from a registered nurse addressed appellant's knee and bronchitis conditions.

Subsequent to the telephonic hearing which was held on January 5, 2017, appellant submitted additional reports from Dr. Donley. In a December 9, 2002 right knee x-ray report, Dr. Donley found significant degenerative arthritis with cystic changes in the osseous structures with what appeared to be multiple spurs and possible loose bodies. In reports dated January 6, 2002 to June 2, 2003, he described examination findings, provided an assessment of right knee osteoarthritis, and indicated that appellant received multiple Hyalgan injections.

By decision dated February 15, 2017, an OWCP hearing representative affirmed the denial of appellant's claim. She found that the medical evidence of record was insufficient to establish causal relationship between his diagnosed right knee condition and the accepted employment factors.⁷

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.¹⁰

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is rationalized medical opinion

⁷ In the February 15, 2017 decision, OWCP's hearing representative noted that the medical evidence of record in the present case, specifically, Dr. Gaw's May 21, 2013 report, was previously reviewed by the Board in its November 24, 2014 decision under File No. xxxxxx912 and found to be deficient.

⁸ *Supra* note 2.

⁹ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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 employee.¹¹

ANALYSIS

OWCP accepted as factual that appellant performed the work duties of a supervisory mine safety and health specialist (electrical), which involved bending, stooping, crawling, and climbing underground in coal mines. The Board finds, however, that the medical evidence of record is insufficient to establish a right knee condition caused or aggravated by the accepted work factors.

In a May 21, 2013 report, Dr. Gaw diagnosed postoperative right total knee replacement and found that appellant had 25 percent permanent impairment of the right leg or 10 percent permanent impairment of the whole person under the sixth edition of the A.M.A., *Guides*. He noted appellant's work duties which included bending, squatting, sitting, standing, stooping, and crawling. Dr. Gaw opined that his work activities were either a significant factor in the development of his right knee arthritis or aggravated an arthritic condition. He further opined that it was more likely than not that appellant's November 13, 2007 right total knee replacement was necessitated by his work activities which he performed for more than 25 years. However, Dr. Gaw's opinions on causal relation are speculative. The Board has held that medical opinions which are speculative or equivocal are of diminished probative value.¹² Furthermore, a mere conclusion without the necessary rationale explaining how work activities could result in the diagnosed condition is insufficient to meet appellant's burden of proof.¹³ Dr. Gaw's opinions are of limited probative value as they do not contain any medical rationale explaining how appellant's job duties caused or contributed to the diagnosed right knee condition, or aggravated a preexisting right knee condition that necessitated surgery and resulted in permanent impairment.¹⁴

Dr. Donley's September 23, 1987 surgical report and undated attending physician's report found that appellant had tendinitis in the anterior aspect of the right knee due to the accepted September 18, 1987 employment injury. These reports, however, are of little probative value on the relevant issue of the present case in that Dr. Donley provided no opinion that appellant had a right knee condition caused or aggravated by the employment factors which were

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.*

¹² *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (the Board has generally held that opinions such as the condition is probably related, most likely related, or could be related are speculative and diminish the probative value of the medical opinion); *Cecilia M. Corley*, 56 ECAB 662 (2005) (medical opinions which are speculative or equivocal are of diminished probative value).

¹³ *See D.P.*, Docket No. 17-0148 (issued May 18, 2017); *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁴ *D.P.*, *id.*; *S.H.*, Docket No. 16-1227 (issued February 9, 2017).

accepted in connection with the occupational disease claim he filed on February 11, 2016.¹⁵ Thus, the Board finds that Dr. Donley's reports are of limited probative value and insufficient to meet appellant's burden of proof. Likewise, Dr. Donley's remaining reports are of limited probative value as they also failed to provide an opinion addressing whether appellant's claimed right knee condition was causally related to the accepted employment factors.¹⁶

Similarly, Dr. Horsley's diagnostic test results and Dr. Chengler's clinical records and reports are of limited probative value. This evidence provided right knee diagnoses and addressed appellant's surgical treatment and impairment, but neither physician provided an opinion stating that the diagnosed conditions, surgical treatment, and impairment were caused or contributed to by the established employment factors.¹⁷

Appellant also submitted evidence from a registered nurse. However, such evidence has no probative medical value on the issue of causal relationship as a nurse is not a physician as defined under FECA.¹⁸

Appellant's belief that factors of employment caused or aggravated his condition is insufficient, by itself, to establish causal relationship.¹⁹ The issue of causal relationship is a medical one and must be resolved by probative medical opinion from a physician. The Board finds that there is insufficient medical evidence of record to establish that appellant's claimed occupational right knee condition was caused or aggravated by the established employment factors. Appellant, therefore, failed to meet his burden of proof.

On appeal counsel contends that Dr. Donley's September 23, 1987 report and Dr. Gaw's May 21, 2013 report are sufficient to establish that appellant's degenerative arthritis of the right knee and resultant disability are due to his federal employment. For the reasons previously set forth herein, the Board finds that these reports are of diminished probative value. It is appellant's burden to provide a rationalized medical opinion explaining how the diagnosed right knee condition had been caused or aggravated by the accepted employment factors. Appellant failed to provide the requisite medical opinion and thus, has failed to meet his burden of proof.

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.

¹⁵ See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006) (medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *Roy L. Humphrey*, 57 ECAB 238 (2005); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

¹⁹ 20 C.F.R. § 10.115(e); *Phillip L. Barnes*, 55 ECAB 426, 440 (2004).

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish a right knee condition causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT the February 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2017
Washington, DC

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

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

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