United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
	)	
and	)	**Docket No. 16-0726**
	)	**Issued: October 12, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Norwood, MA, Employer	)	
	)	

Appearances:
Daniel B. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2016 appellant, through counsel, filed a timely appeal from a February 3, 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.[3]

[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 (2006). 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.*

[3] Counsel timely requested oral argument; however, the Board exercised its discretion and denied the request pursuant to 20 C.F.R. § 501.5(a). *See Order Denying Request for Oral Argument*, Docket No. 16-0726 (issued August 1, 2016).

ISSUE

The issue is whether appellant met his burden of proof to establish a left knee condition causally related to his accepted employment factors.

FACTUAL HISTORY

On September 19, 2013 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that permanent acceleration of his bilateral knee osteoarthritis was due to his employment. He identified July 2, 2013 as the date he first realized that his claimed condition was employment related.

In a report dated September 19, 2011, Dr. Peter DeWire, an attending Board-certified orthopedic surgeon, indicated that the findings of x-ray testing of appellant's knees, obtained on that date, showed bilateral moderate arthritis consistent with an inflammatory-type arthritis. A report of September 19, 2011 x-ray testing of appellant's right knee contained an impression of bi-compartmental knee degenerative disease associated with small effusion of unknown etiology and possible popliteal artery aneurysm.

The findings of December 28, 2011 bilateral knee x-rays reflected an impression of genu varus deformity on the right side with advanced degeneration of the medial joint compartment, genu valgus deformity on the left side with advanced degeneration of the lateral joint compartment, small joint effusion on the right side, and degenerative changes of the right lateral compartment, right patellofemoral cartilage, and left medial compartment. OWCP received a December 28, 2011 report from Dr. Joseph C. McCarthy, an attending Board-certified orthopedic surgeon, in which he reviewed December 28, 2011 x-rays and noted a varus deformity with loss of joint space in the medial compartment, and some mild degenerative joint disease of the patellofemoral compartment of the right knee and valgus deformity, lateral-to-medial shift with loss of joint space in the lateral compartment, and mild degenerative joint disease of the patellofemoral joint of the left knee.

In a September 12, 2013 report, Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, discussed appellant's factual and medical history and reported findings on physical examination from a July 2, 2013 examination. He advised that appellant's 28-year employment history as a letter carrier contributed to the progression of his bilateral knee degenerative arthritis.

In a March 13, 2014 decision, OWCP denied the claim finding Dr. Hartunian's opinion insufficient to establish a causal relationship between appellant's letter carrier duties and his preexisting bilateral knee osteoarthritis.

Counsel timely requested a hearing with OWCP's Branch of Hearings and Review, which was held on September 16, 2014.

In a supplemental report dated September 9, 2014, Dr. Hartunian noted that appellant's job required constant and repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting activities. He explained that the impact loading resulting

from appellant's heavy physical duties, combined with constant, repetitive local stresses that regularly occurred over the course of a workday, accelerated appellant's underlying arthritis. More specifically, appellant's excessive impact loading and repeated local stresses caused mechanical stresses on the cartilage surface resulting in chronic inflammation, which accelerated the loss of articular cartilage. Dr. Hartunian further explained that, without the work activities in which appellant had engaged during his letter carrier career, his condition would not have progressed as early as it had by the time he was examined in July 2013.

By decision dated December 8, 2014, OWCP's hearing representative set aside OWCP's March 13, 2014 decision and remanded the case for additional medical development, including referral of the case to a second opinion physician.

On remand, OWCP referred appellant for a second opinion examination to Dr. Stanley Hom, a Board-certified orthopedic surgeon.

In a report dated January 14, 2015, Dr. Hom discussed appellant's medical history and detailed his performance of work duties while sorting and delivering mail. He reported the findings of the January 13, 2015 physical examination and diagnosed bilateral knee osteoarthritis, more symptomatic on the right than the left. Dr. Hom found that appellant's bilateral knee condition was not employment related. He noted that the development of osteoarthritis was dependent upon a complex interaction between a generalized systemic diathesis (predisposition) and was influenced by local mechanical factors peculiar to the knee joints. Dr. Hom indicated, "In my opinion, the claimant's condition was not directly caused, accelerated, or precipitated by specific factors of his federal employment."

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Hartunian, appellant's attending physician and Dr. Hom, OWCP referral physician, regarding appellant's work-related conditions and disability. In order to resolve this conflict, it referred appellant to Dr. Alan Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

In an undated report received by OWCP on May 20, 2015, Dr. Solomon, the impartial medical examiner (IME), discussed appellant's factual and medical history, noting that he had a congenital deformity of his right lower extremity with right knee symptoms beginning more than 10 years prior. Appellant reported that in 2007 he began to experience increased pain and swelling in his right knee without a specific injury or event. Dr. Solomon discussed the findings of appellant's x-ray testing since 2007, including the results of December 28, 2011 testing of appellant's knees which showed varus deformity with loss of joint space in the medial compartment, and some mild degenerative joint disease of the patellofemoral compartment of the right knee and valgus deformity, lateral-to-medial shift with loss of joint space in the lateral compartment, and mild degenerative joint disease of the patellofemoral joint of the left knee. He noted that further worsening of appellant's degenerative knee condition was seen in x-rays testing from 2013. Dr. Solomon described the findings of the physical examination on April 22, 2015 noting that appellant stood with his torso tilted to the left side with some elevation of the right pelvis compared to the left pelvis and apparent avoidance of weight bearing on the right side. He reported that appellant's right side/leg demonstrated restricted right hip internal rotation as compared to the left side, but reasonable external rotation and abduction. The appearance of

the right lower leg simulated that of an established congenital deformity of internal tibial torsion which had not been corrected through childhood. No right rotary motion (internal or external rotation) of the right knee could be obtained and the attempt of such motion caused pain.[4]

In his report, Dr. Solomon further noted that he felt that appellant's right knee condition, including arthrosis, was aggravated and accelerated by his work demands including carrying weight, one-sided loading, and stair climbing. He noted that appellant lived with a postural problem from childhood and that he adjusted to this postural problem by shifting of his center of gravity. Dr. Solomon indicated that the degree and location of the osteoarthritic cartilage erosion in his right knee was "not usual" in that he developed right medial femoral condylar erosion and left lateral condylar erosion which was an unusual pattern. He noted that the left knee did not show the appearance of internal tibial torsion and that it had not yet developed the swelling, pain, effusion, and instability seen on the right side. Dr. Solomon posited that, in the course of time, the left knee would develop further symptoms and erosion and would eventually require more focal attention, possibly even surgery if symptoms became disabling. He indicated that he felt that appellant's disability claim for right knee acceleration and aggravation of a preexisting condition should be accepted as of 2013. Dr. Solomon concluded that appellant's left knee condition should not be judged to be a work-related acceleration or an aggravation.

Dr. Solomon completed a work capacity evaluation (Form OWCP-5c) on April 23, 2015 in which he indicated that appellant could not perform his usual job due to the effects of February 2015 left shoulder surgery which "needs 3 [through] 5 months for recovery." He found that appellant could work eight hours per day with restrictions lasting three months, including no lifting, pushing, or pulling more than five pounds.

On June 11, 2015 OWCP accepted appellant's claim for permanent aggravation of right knee osteoarthritis and permanent aggravation of right knee medial femoral condyle erosion. It specifically declined to accept his claimed left knee condition.

On July 9, 2015 counsel timely requested a hearing with OWCP's Branch of Hearings and Review and a hearing was held on November 20, 2015.

Appellant submitted a November 9, 2015 report in which Dr. Hartunian noted that September 19, 2011 x-rays of the left knee showed "moderate arthritis," that December 28, 2011 x-rays of the left knee revealed "advanced degeneration" of the lateral joint compartment of his left knee, and that May 28, 2013 x-rays of the left knee indicated "end-stage osteoarthritis of the knees." He noted that these studies provided objective evidence of the progression of appellant's left knee osteoarthritis during the time he was engaged in strenuous work activities. Dr. Hartunian indicated that Dr. Solomon's report did not reference these radiology studies and the progressive nature of the disease. He claimed that Dr. Solomon did not consider the left knee x-rays obtained between 2011 and 2013 that demonstrated a progression of the left knee arthritis while appellant continued to work as a letter carrier.

[4] As part of his evaluation, Dr. Solomon ordered x-rays of appellant's hip and the resultant findings of the x-rays showed degenerative arthritis in both hips.

By decision dated February 3, 2016, OWCP's hearing representative affirmed OWCP's June 11, 2015 acceptance of only the right knee condition, but affirmed the denial of the claim for the left knee condition. She found that the left knee condition was not causally related to factors of appellant's employment.

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[5]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (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 diagnosed condition is causally related to the identified employment factors.[6]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional misconduct.[7] Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[8]

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[9]

[5] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[6] *Victor J. Woodhams*, *id*.

[7] *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* 10-1 (2006).

[8] *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

[9] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

The mere fact that a condition manifests itself during a period of employment is not sufficient to establish causal relationship.[10] Temporal relationship alone will not suffice.[11] Generally, medical evidence is required to establish causal relationship.[12]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[13] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[14] Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Hartunian, appellant's attending physician, and Dr. Hom, OWCP's referral physician, regarding appellant's work-related conditions and disability. In September 12, 2013 and September 9, 2014 reports, Dr. Hartunian advised that appellant's 28-year employment history as a letter carrier contributed to the progression of his bilateral knee degenerative arthritis. In contrast, Dr. Hom determined in a January 14, 2015 report that appellant's bilateral knee condition was not directly caused, accelerated, or precipitated by specific factors of his federal employment.

In order to resolve this conflict, OWCP referred appellant to Dr. Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. On appeal counsel argues that OWCP improperly found a conflict in the medical opinion evidence because the opinions of Dr. Hartunian and Dr. Hom were not of virtually equal weight and rationale. However, the Board has carefully reviewed the opinions of both physicians and finds that they are of virtually equal weight and rationale and that the referral to Dr. Solomon was proper.[16]

The Board notes that OWCP relied on the opinion of Dr. Solomon to accept work-related conditions of appellant's right knee, including permanent aggravation of right knee osteoarthritis and permanent aggravation of right knee medial femoral condyle erosion. OWCP also determined that the opinion of Dr. Solomon showed that appellant did not have a work-related

[10] 20 C.F.R. § 10.115(e).

[11] *See D.I.*, 59 ECAB 158, 162 (2007).

[12] *Robert G. Morris*, *supra* note 5.

[13] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[14] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[15] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[16] *See supra* note 14.

left knee condition. It denied appellant's claim for a work-related left knee condition in decisions dated June 11, 2015 and February 3, 2016.

The Board finds that OWCP properly relied on the opinion of Dr. Solomon in denying appellant's claim for a work-related left knee condition. Dr. Solomon found in his well-rationalized opinion that appellant did not have a work-related left knee condition.

As noted, when a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[17] The IME provided a well-reasoned report based on a proper factual and medical history. He accurately summarized the relevant medical evidence, and relied on the statement of accepted facts. Dr. Solomon also examined appellant and provided a thorough review of the relevant medical records. His report included detailed findings on physical examination and medical rationale supporting his opinion. As the IME, Dr. Solomon's April 23, 2015 opinion is entitled to special weight.[18]

Dr. Solomon provided medical rationale in support of his opinion that appellant did not have a work-related left knee condition. He provided detailed accounts of the diagnostic testing and physical examination findings for the right and left knees noting differences in the nature and severity of the conditions found in each knee. Dr. Solomon discussed the internal tibial torsion of appellant's right lower extremity and posited that the more severe and unusual nature of appellant's right knee condition showed that it had been accelerated by the performance of his work duties over time. He indicated that the degree and location of the osteoarthritic cartilage erosion in appellant's right knee was "not usual" in that he developed right medial femoral condylar erosion and left lateral condylar erosion, conditions which were aggravated by his work duties. Dr. Solomon noted that the left knee did not show the appearance of internal tibial torsion and that it had not yet developed the swelling, pain, effusion, and instability seen on the right side.

On appeal counsel argues that Dr. Solomon did not consider all the relevant evidence of record, including the diagnostic testing of record. However, a review of Dr. Solomon's opinion shows that he did, in fact, consider all the relevant evidence. He specifically described the findings of x-ray testing of appellant's knees since 2007, noting that appellant's degenerative knee condition had progressed by the time additional x-ray testing was obtained on December 28, 2011. Dr. Solomon indicated that x-ray testing from 2013 revealed that appellant's degenerative knee condition had further progressed by that time.[19]

In a report dated November 9, 2015, Dr. Hartunian continued to find that appellant's left knee condition was related to work factors. The Board notes that subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the special weight accorded the IME's report and/or

[17] *See supra* note 15.

[18] *Id.*

[19] On appeal counsel also generally questions the definitions of causation contained in the Federal (FECA) Procedure Manual, but he did not explain how this argument is relevant to the disposition of the present case.

insufficient to create a new medical conflict.[20] As a party to the original conflict, Dr. Hartunian's November 9, 2015 report is insufficient to overcome the special weight properly accorded Dr. Solomon's opinion, and is similarly insufficient to create a new conflict in medical opinion evidence. Accordingly, the Board finds that appellant did not meet his burden of proof to establish a left knee condition causally related to his accepted employment factors.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a left knee condition causally related to his accepted employment factors.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[20] *I.J.*, 59 ECAB 408, 414 (2008).