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

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| **M.M., Appellant** | ) | |
| **and** | ) | **Docket No. 16-1655** |
| | ) | **Issued: April 4, 2018** |
| **DEPARTMENT OF THE NAVY, NAVAL WEAPONS CENTER, China Lake, CA, Employer** | ) | |

*Appearances:*
*Sally F. LaMacchia, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On August 15, 2016 appellant, through counsel, filed a timely appeal from a February 18, 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 this claim.

### ***ISSUE***

The issue is whether appellant met her burden of proof to establish a consequential left knee condition causally related to her December 21, 2005 work injury.

[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***

This case has previously been before the Board. The facts and circumstances as outlined in the Board's prior decision are incorporated herein by reference.[3] The relevant facts are as follows.

On December 21, 2005 appellant, then a 55-year-old information technology specialist, tripped and fell in the performance of duty.[4] In August 2006, OWCP initially accepted her traumatic injury claim (Form CA-1) for contusions of the right knee and right wrist/hand.[5] It subsequently expanded the acceptance of the claim to include right carpal tunnel syndrome, enthesopathy of the right wrist and carpus, right knee lateral meniscus tear, and psychogenic pain. In May 2007, appellant underwent the first of several OWCP-authorized right knee surgical procedures.[6] In July 2008, she underwent a right carpal tunnel release. Appellant received wage-loss compensation beginning July 24, 2008. OWCP placed her on the periodic compensation rolls effective August 31, 2008. In June 2009, OWCP further expanded the acceptance of the claim to include aggravation of right knee degenerative joint disease as an accepted condition. It also authorized a right total knee arthroplasty.[7]

In a July 13, 2009 letter, counsel requested that OWCP expand the acceptance of the claim to include left knee degenerative joint disease (osteoarthritis) as an accepted condition. She claimed that appellant also injured her left knee when she fell at work on December 21, 2005.

By letter dated August 4, 2009, OWCP advised counsel that the record was insufficient to support further expansion of the acceptance of the claim to include a left knee consequential injury. It afforded appellant 30 days to submit additional medical evidence.

In an August 25, 2009 letter, counsel alleged that OWCP did not clearly identify the perceived deficiencies in the current medical record regarding appellant's left knee condition. It suggested that OWCP either decide the case on the current record or refer appellant for a second opinion evaluation.

In a September 14, 2009 report, OWCP's district medical adviser (DMA) advised that the medical evidence submitted did not establish that there was a consequential left knee injury.

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[3] Docket No. 15-1724 (issued February 16, 2016) (the Board affirmed OWCP's finding regarding reimbursement of medical-related travel expenses).

[4] Appellant was walking down the stairs when her left foot got caught on a garden hose that was on the stairs. She stumbled and fell to the sidewalk.

[5] Appellant also has an accepted claim (OWCP File No. xxxxxx096) for nose laceration and soft tissue injury to both knees and right hand, and cervical strain due to a work-related fall on January 6, 1989. OWCP combined the two traumatic injury claims and designated File No. xxxxxx350 as the master file.

[6] On May 31, 2007 Dr. Mohamed Z. Lameer, an orthopedic surgeon, performed an arthroscopic right knee synovectomy, and partial medial and lateral meniscectomies.

[7] Dr. Lameer performed the procedure on August 12, 2009.

In 2010, appellant changed her treating physician to Dr. Young N. Paik, an orthopedic surgeon. In a May 18, 2010 report, Dr. Paik diagnosed left knee severe degenerative joint disease and requested authorization for total left knee arthroplasty.

OWCP referred appellant to Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether her left knee condition was causally related to the accepted December 21, 2005 work injury. In an August 26, 2010 report, Dr. Ha'Eri noted the history of injury, his review of the medical records and statement of accepted facts (SOAF), and presented examination findings. He diagnosed left knee medial compartment degenerative joint disease and a degenerative tear of medial meniscus. Dr. Ha'Eri opined that those conditions were not medically connected to the work injury as they were degenerative in nature. He indicated that appellant's degenerative joint disease of the left knee would gradually worsen and eventually require left knee replacement surgery.

Appellant continued to receive treatment for her accepted right knee condition. She subsequently came under the care of Dr. Paul Burton, an orthopedic surgeon, and Dr. Jonathan K. Lee, a physiatrist. On May 23, 2012 appellant underwent a right knee revision arthroplasty.

Appellant and her counsel continued to request coverage for the left knee condition.

In July 2013, OWCP initiated another second opinion referral to Dr. Ha'Eri to obtain an updated opinion on whether appellant's left knee condition was related to the December 21, 2005 work injury. An updated SOAF, which included the history of the 1989 work injury,[8] and questions were provided. In a September 16, 2013 report, Dr. Ha'Eri noted the history of injury and his review of the SOAF and the medical record. He presented examination findings and diagnosed left knee contusion and possible internal derangement. Dr. Ha'Eri indicated that he would address causation of the left knee condition pending new x-ray and magnetic resonance imaging (MRI) scans.

In a September 19, 2013 addendum report, Dr. Ha'Eri reviewed a recent September 2013 x-ray of appellant's left knee, which was reported to show moderate osteoarthritis especially involving the medial joint compartment. He diagnosed a resolved left knee contusion and a nonindustrial left knee moderate osteoarthritis. Dr. Ha'Eri indicated that the left knee contusion had resolved. He indicated the left knee osteoarthritis was of moderate degree and was degenerative in nature and not medically connected to the December 21, 2005 work injury. Dr. Ha'Eri further indicated that aggravation was not indicated in this case.

In a March 17, 2014 report, Dr. Shahin Sadik, a Board-certified anesthesiologist, reported that appellant had paperwork to have her back and left knee conditions included in her claim. He indicated that the right knee injury, which required surgery, led to lengthening of the right leg that in turn, caused stress on appellant's spine and left knee. Dr. Sadik indicated that prior to the December 21, 2005 work injury, appellant never had left knee or spine problems. He noted that both knees were painful on examination.

[8] *See supra* note 5.

In a May 27, 2014 report, Dr. Philip H. Conwisar, a Board-certified orthopedic surgeon, noted the history of appellant's work injuries and her complaints of left knee and low back pain. He presented examination findings and, in relevant part, diagnosed left knee internal derangement and lumbar spondylosis. Dr. Conwisar noted that appellant's right leg measured longer than her left leg. He also indicated that she walked with a significant and severe limp for several years due to the multiple problems with the right knee, which was status post revision, right total knee arthroplasty, and complex regional pain syndrome, right lower extremity. Dr. Conwisar opined, with reasonable medical probability, that the altered gait mechanics, and the altered leg length of the right leg had contributed to injury involving the left knee and the lumbar spine, aggravating the underlying spondylosis of the lumbar spine and caused it to become symptomatic, as well as contributing to and causing left knee pain. He opined that treatment for the lumbar spine and left knee was indicated as a consequence of the right knee injury. Dr. Conwisar also reviewed Dr. Ha'Eri's reports and opined that the degenerative joint disease of the left knee had been aggravated by the altered gait mechanics and the prolonged gait abnormalities related to the 2005 right knee injury. He explained that this caused increased pressure on the left knee, which resulted in an aggravation of the underlying condition.

OWCP subsequently determined that a conflict in medical opinion existed between Dr. Ha'Eri and Dr. Conwisar regarding the cause of appellant's left knee condition. It scheduled an impartial medical examination with Dr. Benjamin Broukhim, a Board-certified orthopedic surgeon, to resolve the conflict regarding whether appellant's left knee osteoarthritis/ degenerative joint disease was causally related to the 2005 work injury.

In a January 6, 2015 report, Dr. Broukhim noted appellant's work injuries of 1989 and 2005, his review of the medical records, and presented examination findings. In relevant part, he opined that appellant had multilevel degenerative disc disease of the lumbar spine which became aggravated and symptomatic as a result of antalgic gait of the right lower extremity as a result of the total knee replacement stemming from the December 21, 2005 work injury. Dr. Broukhim also opined that appellant had a degenerative tear of the medial meniscus of the left knee with degenerative changes at the medial joint line of the left knee. He determined that these conditions became symptomatic and aggravated as a result of the antalgic limp resulting from the industrial injury of December 21, 2005 with the need for multiple surgeries to her right knee. Dr. Broukhim opined that appellant's lower back and left knee conditions represented an aggravation preexisting degenerative changes as a result of the December 21, 2005 work injury, for which she required multiple surgeries and revision of the total knee replacement. He concluded that the injury and treatment caused significant limb and leg length discrepancy as well as reflex sympathetic dystrophy in her right lower extremity. Dr. Broukhim opined that appellant required further medical treatment to her left knee and lumbar spine. He also opined that appellant was capable of working eight hours per day in a sedentary capacity with restrictions as a result of her accepted conditions from the December 21, 2005 work injury.

OWCP subsequently learned that Dr. Broukhim and Dr. Ha'Eri were part of the same medical practice. Because of their prior relationship, Dr. Broukhim was disqualified from serving as an impartial medical examiner with respect to the conflict between Dr. Ha'Eri and Dr. Conwisar. OWCP determined that Dr. Broukhim's report would be treated as a second opinion. It also found that the initial conflict remained unresolved.

In a letter dated May 6, 2015, OWCP informed counsel that a procedural error had occurred when the impartial medical examination was scheduled with Dr. Broukhim and indicated that appellant would be referred for a new impartial examination. It additionally noted that Dr. Broukhim's opinion regarding appellant's work capacity created an additional conflict in medical opinion with Dr. Conwisar and Dr. Shahin A. Sadik, who opined in his March 22, 2015 report that appellant was unable to return to any type of meaningful work.[9]

OWCP referred appellant, along with the medical record, a list of questions, and a SOAF, to Dr. John D. Kaufman, a Board-certified orthopedic surgeon, for a new impartial medical examination to resolve the conflict in medical opinion. In a November 19, 2015 report, Dr. Kaufman noted appellant's complaints, the history of the December 21, 2005 work injury, and his review of the medical reports. He presented examination findings and diagnosed status post right total knee arthroplasty in satisfactory position, left knee osteoarthritis primarily medial compartment, and lumbar spine degenerative disc disease. Dr. Kaufman opined that there was no connection between appellant's left knee and low back conditions and the December 21, 2005 work injury. He indicated that evidence based studies did not show any connection between a new problem causing a pathological condition in the opposite knee or causing low back degenerative disc disease or back pain. Dr. Kaufman explained that appellant's left knee osteoarthritis was degenerative in nature and was not caused by any extra stress because of the problems with her right knee. He also stated that there was no evidence to show a relationship between altered gait due to problems of one knee producing degenerative changes or pain in the other knee. Dr. Kaufman indicated that appellant's lumbar spine degenerative disc disease was not caused by the work injury or by abnormal gait. Medical references were cited in support of his opinion on causation.

By decision dated February 18, 2016, OWCP denied appellant's request to expand the acceptance of the claim to include additional left knee diagnoses. It found the special weight of the medical evidence, as represented by Dr. Kaufman's impartial medical opinion, established that the left knee conditions were unrelated to the accepted December 21, 2005 work injury.

## ***LEGAL PRECEDENT***

When 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.[10]

[9] Dr. Sadik is a Board-certified anesthesiologist who was treating appellant for pain in her low back and bilateral knees. Dr. Conwisar referred appellant's disability status to Dr. Sadik. The issue of continuing disability is not presently before the Board.

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

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 a claimant's own intentional misconduct.[11] 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.[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 impartial medical examiner 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***

On December 21, 2005 appellant tripped and fell at work. OWCP accepted her traumatic injury claim for contusions of the right knee and right wrist/hand, right carpal tunnel syndrome, enthesopathy of the right wrist and carpus, right knee lateral meniscus tear, psychogenic pain, and aggravation of right knee degenerative joint. It also authorized multiple surgeries involving the right upper and lower extremities. Appellant later claimed that she developed a consequential left knee condition, which OWCP declined to accept as causally related to the December 21, 2005 employment injury.

In an August 26, 2010 report, Dr. Ha'Eri, an OWCP referral physician, reviewed appellant's history of a work injury in 1989 and December 21, 2005. He diagnosed left knee medial compartment degenerative joint disease and degenerative tear of medial meniscus. Dr. Ha'Eri attributed the left knee conditions to a nonindustrial basis as they were of a degenerative nature. He subsequently reexamined appellant on September 16, 2003 and provided reports dated September 16 and 19, 2013. Dr. Ha'Eri diagnosed left knee moderate osteoarthritis, which he opined was degenerative and nonindustrial. He also diagnosed a left knee contusion which had resolved, based on his review of the medical records.

OWCP properly determined that Dr. Conwisar provided in his May 27, 2014 report a well-rationalized opinion, based on appellant's examination and medical history, to support his conclusion that the condition of degenerative joint disease of the left knee had been aggravated by altered gait mechanics and prolonged gait abnormalities related to the right knee injury, which caused increased pressure on the left knee and aggravated the underlying condition. Pursuant to

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

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

[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).

section 8123(a) of FECA, it properly determined that a conflict existed between Dr. Ha'Eri and Dr. Conwisar regarding whether the left knee osteoarthritis/degenerative joint disease was medically connected to the 2005 work injury by aggravation. It referred appellant to Dr. Broukhim for an impartial medical examination. However, at the time of OWCP's referral of appellant to Dr. Broukhim, the evidence of record revealed that Dr. Broukhim and Dr. Ha'Eri were medical associates and worked out of the same office.[16] OWCP thus properly found Dr. Broukhim's opinion was not that of an impartial medical examiner, but rather a second opinion physician.[17] Pursuant to 5 U.S.C. § 8123(a) and its procedures, the Board finds that OWCP properly referred appellant to Dr. Kaufman for a new referee examination to resolve the ongoing conflict in medical opinion evidence between Dr. Ha'Eri and Dr. Conwisar.[18]

Dr. Kaufman was provided copies of the complete case file, the SOAF, and he personally examined appellant. In his November 19, 2015 report, Dr. Kaufman opined that appellant's left knee condition was degenerative in nature and that it was not caused by any extra stress because of the problems with the right knee. He also noted that there was no evidence which showed a relationship between altered gait due to problems of one knee producing degenerative change or pain in the other knee. Dr. Kaufman further opined that appellant's lumbar spine degenerative disc disease was degenerative in nature and not caused by the work injury or by abnormal gait. He cited medical references in support of his opinion on causation.

The Board finds that Dr. Kaufman's report represents the special weight of the medical evidence with regard to the issue of whether appellant's claim should be expanded to include a consequential left knee condition. The Board finds that he had full knowledge of the relevant facts and evaluated the course of her condition. Dr. Kaufman is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Kaufman addressed the medical records and offered his own examination findings to reach a reasoned conclusion regarding appellant's left knee condition. As the impartial medical examiner, Dr. Kaufman's opinion regarding whether appellant's left knee condition is causally related to the employment injury is entitled to special weight.[19]

On appeal counsel noted the procedural difficulties and many years spent getting OWCP to issue a decision on her request for expansion. For the reasons set forth above, the Board finds that OWCP properly declared a conflict in medical opinion and that Dr. Kaufman's opinion establishes that appellant's left knee condition is not causally related to the December 21, 2015 employment injury.

[16] *See Raymond E. Heathcock*, 32 ECAB 2004 (1981) (holding that OWCP could not use the report of one physician to resolve a conflict in medical evidence because he was an associate of another physician previously connected with the case, and therefore, was not completely independent).

[17] *See C.D.*, Docket No. 15-0446 (issued April 27, 2015).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(e) (September 2010); *see also William C. Iadipaolo*, 39 ECAB 530 (1988).

[19] *Supra* note 15.

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 and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof to establish a consequential left knee condition causally related to her December 21, 2005 work injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2018
Washington, DC

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

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

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