

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

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-1358
Issued: February 1, 2018**

Appearances:

Michael D. Overman, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 9, 2017 appellant, through counsel, filed a timely appeal from an April 4, 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.

ISSUE

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

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.³ The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On March 22, 2010 appellant, then a 53-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral knee pain and swelling and a medial meniscal tear due to climbing up and down steps in the performance of duty for many years. He submitted medical evidence. By decision dated June 2, 2010, OWCP denied appellant's claim, finding the medical evidence insufficient to establish causal relationship. It developed this matter under OWCP File No. xxxxxx382.

On September 15, 2010 OWCP obtained a second opinion evaluation from Dr. Lawrence Barr, an osteopath and Board-certified internist, who found no pathophysiological causal relationship between appellant's work duties and bilateral knee osteoarthritis.

By decision dated October 29, 2010, OWCP denied appellant's claim, finding that the weight of Dr. Barr's report negated causal relationship. Appellant appealed to the Board on January 26, 2011.

OWCP also accepted that on October 11, 2011, appellant sustained a left knee contusion in a work-related motor vehicle accident claim under OWCP File No. xxxxxx345.⁴

By decision and order issued November 18, 2011,⁵ the Board set aside OWCP's October 29, 2010 decision. The Board found that Dr. Barr's opinion could not represent the weight of the medical evidence as it was based on an inaccurate factual history inconsistent with the statement of accepted facts (SOAF). The Board remanded the case to OWCP to obtain a referral opinion regarding whether appellant's years of walking up and down steps in his job caused or aggravated his claimed condition.

On remand, OWCP obtained a second opinion from Dr. Stanley Askin, a Board-certified orthopedic surgeon, who provided a January 26, 2012 report attributing appellant's bilateral knee osteoarthritis solely to aging. Dr. Askin submitted a February 10, 2012 addendum report finding no causal relationship between appellant's employment and the development of the claimed condition.

By decision dated April 2, 2012, OWCP denied appellant's occupational disease claim, finding that causal relationship had not been established, based on Dr. Askin's opinion as the

³ Docket No. 15-0156 (issued March 24, 2015); Docket No. 11-0692 (issued November 18, 2011).

⁴ OWCP administratively combined File Nos. xxxxxx382 and xxxxxx345, with the latter serving as the master file. Appellant also has claims under File No. xxxxxx922, accepted for a February 21, 2003 left knee injury, and File No. xxxxxx852, accepted for an April 30, 2011 right knee sprain. File Nos. xxxxxx922 and xxxxxx852 are not before the Board on the present appeal.

⁵ Docket No. 11-0692 (issued November 18, 2011).

weight of the medical evidence. Counsel disagreed with this decision and requested a hearing with OWCP's Branch of Hearings and Review.

By decision dated June 13, 2012, a representative of OWCP's Branch of Hearings and Review conducted a preliminary review and set aside OWCP's April 2, 2012 decision, finding that Dr. Askin's opinion could not represent the weight of the medical evidence as it required clarification. The hearing representative directed that OWCP request an addendum report from Dr. Askin.

On June 28, 2012 OWCP provided an updated SOAF to Dr. Askin. At OWCP's request, Dr. Askin submitted July 5, November 28, and December 11, 2012 addendum reports. He opined that appellant's knee injuries and employment factors did not cause, aggravate, or accelerate the claimed bilateral knee osteoarthritis.

By decision dated May 21, 2013, OWCP denied appellant's occupational disease claim, finding that causal relationship was not established and that Dr. Askin's opinion continued to represent the weight of the medical evidence.

In a May 28, 2013 letter, counsel requested a hearing, held September 24, 2013. He asserted that Dr. Askin's opinion should be given no medical weight as he was unable to clarify his opinion on causal relationship in any of his five reports. Counsel provided a September 21, 2013 report from Dr. Colin A. Campbell, an attending osteopath Board-certified in internal medicine. Dr. Campbell opined that the February 21, 2003 employment-related left meniscal tear, OWCP File No. xxxxxx922, began the degradation of appellant's left knee, further exacerbated by carrying heavy packages on a deranged left knee, leading to arthritis. The October 11, 2011 employment injury further progressed the degeneration of appellant's knee.

By decision dated December 11, 2013, OWCP's hearing representative set aside the May 21, 2013 decision. She directed OWCP to prepare a new SOAF and refer appellant to a new second opinion specialist, as Dr. Askin "already provided numerous addendums which had defects."

In a December 20, 2013 letter, OWCP referred appellant and an updated SOAF to Dr. Askin, who provided a January 3, 2014 report repeating that appellant's bilateral knee osteoarthritis was an age-related condition unrelated to his federal employment.

On February 18, 2014 OWCP obtained a second opinion report from Dr. Robert Smith, a Board-certified orthopedic surgeon, who opined that the February 21, 2003 employment-related knee injury was not competent to produce osteoarthritis. At OWCP's request, Dr. Smith provided a March 9, 2014 addendum, opining that appellant's bilateral knee osteoarthritis was a "developmental condition" unrelated to her work duties or the accepted injuries.

By decision dated March 12, 2014, OWCP denied appellant's occupational disease claim, finding that, based on Dr. Smith's opinion, causal relationship was not established.

In a March 18, 2014 letter, counsel requested a hearing, held June 9, 2014. At the hearing, he contended that OWCP should have accorded the weight of the medical evidence to

Dr. Campbell, or found a conflict between Dr. Campbell and Dr. Smith requiring resolution by an impartial medical examiner.

By decision dated July 28, 2014, the hearing representative affirmed the March 12, 2014 decision, finding that Dr. Smith provided adequate rationale explaining that appellant's bilateral knee osteoarthritis was age related, with no contribution from his employment. Appellant, through counsel, then appealed to the Board on October 31, 2014.

By decision and order issued March 24, 2015,⁶ the Board set aside OWCP's July 28, 2014 decision, finding a conflict of medical opinion between Dr. Campbell, for appellant, and Dr. Smith, for the government, regarding the etiology of appellant's bilateral knee osteoarthritis. The Board remanded the case to OWCP to obtain an impartial medical opinion from an appropriate specialist, based on an updated SOAF, addressing whether appellant's years of walking up and down steps in his job caused or aggravated his claimed condition.

On remand, OWCP prepared an updated SOAF based on a position description of appellant's date-of-injury letter carrier position. It noted that he was "required to perform arduous exertion involving prolonged standing and walking" while carrying a mail satchel weighing up to 35 pounds. To resolve the conflict of medical opinion between Dr. Campbell and Dr. Smith, OWCP selected Dr. Howard Zeidman, a Board-certified orthopedic surgeon, as an impartial medical examiner. It provided a November 13, 2015 impartial medical examiner referral form and screen captures documenting OWCP's use of the Physician Directory System (PDS). In a series of questions, OWCP specifically requested that Dr. Zeidman address any causal relationship between the 2003 and 2011 accepted employment injuries, appellant's work duties, and the claimed bilateral knee osteoarthritis.

Dr. Zeidman submitted a November 19, 2015 report reviewing the medical record and SOAF. He noted that the record mentioned osteoarthritis of both knees, and MRI scan evidence of a meniscal injury. Dr. Zeidman found appellant able to perform full duty.

In March 15 and May 20, 2016 letters, OWCP sought a supplemental report from Dr. Zeidman addressing causal relationship. It requested that he list all diagnoses of either knee and provide medical rationale explaining how the duties described in the SOAF would cause or contribute to these conditions. OWCP also asked that Dr. Zeidman discuss any relationship between the accepted March 12, 2003 and October 11, 2011 injuries and appellant's ongoing condition. It also provided a work capacity evaluation (Form OWCP-5c) for completion.

Dr. Zeidman responded by May 17, 2016 letter. He diagnosed "degenerative arthritis, mild with minimal changes" of both knees, with radiologic evidence of a torn meniscus, but no clinical indication of derangement. Regarding causal relationship, Dr. Zeidman opined that there did "not appear to be any problem other than that which would reasonably be expected and consistent with [appellant's] age." He found appellant able to perform full duty without restrictions.

⁶ Docket No. 15-0156 (issued March 24, 2015).

In a July 13, 2016 letter, OWCP requested that Dr. Zeidman comply with the two prior requests to provide a well-reasoned report explaining whether appellant's work duties or the February 21, 2003 and October 11, 2011 employment injuries caused or contributed to a diagnosed condition. It also asked that Dr. Zeidman explain why he concluded that appellant's bilateral knee condition was caused by the aging process and not work factors. OWCP requested that he provide his supplemental report within 14 days. Dr. Zeidman did not respond.

By decision dated December 7, 2016, OWCP denied appellant's occupational disease claim for bilateral knee osteoarthritis, finding that the medical evidence failed to establish causal relationship. It explained that, although Dr. Zeidman did not submit a second addendum report as requested by July 13, 2016 letter, his two prior opinions were "sufficient enough to hold the weight of the medical evidence" because of his status as an impartial medical examiner and his review of the record.

In a December 13, 2016 letter, counsel requested a hearing. At the hearing, held March 1, 2017, he contended that Dr. Zeidman was not properly selected using the PDS system as there was no Form ME-023 of record. Counsel also asserted that Dr. Zeidman's opinion could not represent the special weight of the medical evidence as he did not provide medical rationale discussing causal relationship despite OWCP's initial referral and the three requests for clarification. He emphasized that OWCP issued its December 7, 2016 decision, according Dr. Zeidman the weight of the medical evidence, although he refused to respond to the July 13, 2016 request for a supplemental report.

By decision dated April 4, 2017, an OWCP hearing representative affirmed OWCP's December 7, 2016 decision, finding that Dr. Zeidman's opinion was sufficiently rationalized to represent the special weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁸ 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.⁹

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.¹⁰ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following:

⁷ *Supra* note 2.

⁸ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁹ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ 20 C.F.R. § 10.5(q).

(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) 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 generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical 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 claimant.¹¹

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹²

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³ In situations where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.¹⁴ Unless this procedure is carried out by OWCP the intent of section 8123(a) of FECA will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁵

¹¹ *Solomon Polen*, 51 ECAB 341 (2000).

¹² 5 U.S.C. § 8123(a); *see also Charles S. Hamilton*, 52 ECAB 110 (2000).

¹³ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁴ *See Philip H. Conte*, 56 ECAB 213 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹⁵ *Harold Travis*, 30 ECAB 1071 (1979).

ANALYSIS

The Board previously remanded the claim to OWCP for selection of an impartial medical examiner to resolve a conflict of medical opinion between Dr. Campbell, an attending Board-certified internist, and Dr. Smith, a Board-certified orthopedic surgeon, regarding the causal relationship between accepted employment injuries, work factors, and claimed bilateral knee osteoarthritis. OWCP selected Dr. Zeidman, a Board-certified orthopedic surgeon, as an impartial medical specialist. It specifically instructed him to provide medical rationale explaining whether appellant's duties as a letter carrier, or the accepted 2003 and 2011 knee injuries, caused or contributed to the claimed knee conditions.

Dr. Zeidman provided a November 19, 2015 report noting that various reports and studies of record indicated a left medial meniscal tear and bilateral knee osteoarthritis. OWCP determined that Dr. Zeidman's report did not contain the requested medical rationale addressing causal relationship. In March 15 and May 20, 2016 letters, it requested that he submit an addendum report on this issue. In response, Dr. Zeidman submitted a May 17, 2016 letter asserting that appellant's bilateral knee osteoarthritis was age related, but did not explain the medical reasoning supporting this conclusion.

OWCP determined that Dr. Zeidman's supplemental report was inadequate to resolve the medical conflict. To address these deficiencies, it solicited a second addendum report from Dr. Zeidman on July 13, 2016. OWCP specifically requested that he explain the pathophysiologic mechanisms supporting his conclusion that appellant's bilateral knee osteoarthritis was attributable only to the aging process, without any contribution from his federal duties. It also directed that Dr. Zeidman address whether the three prior accepted knee injuries had any effect on his ongoing condition. Dr. Zeidman did not respond. Nevertheless, OWCP issued its December 7, 2016 decisions finding his opinion "sufficient enough" to resolve the conflict, and its April 4, 2017 decision affirming this determination. The Board finds, however, that Dr. Zeidman's opinion is insufficiently rationalized to represent the special weight of the medical evidence.

As explained, where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical evidence and the opinion from such specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.¹⁶ Unless this procedure is carried out by OWCP the intent of section 8123(a) of FECA will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁷

OWCP selected Dr. Zeidman as the impartial medical examiner to resolve a conflict of medical opinion on the issue of causal relationship. To be entitled to special weight, his opinion

¹⁶ *Supra* note 11.

¹⁷ *Supra* note 12.

must contain clear, persuasive rationale on the critical issue in the claim.¹⁸ However, Dr. Zeidman's reports do not contain such rationale. OWCP thrice attempted to obtain an addendum report discussing causal relationship, but ultimately failed to do so. It was then obligated to submit the case record and a SOAF to a new impartial specialist.¹⁹ Instead, OWCP relied on Dr. Zeidman's inadequate opinion. Therefore, the case must be remanded for further development.

Upon remand, OWCP shall combine all cases involving appellant's knee conditions, in particular OWCP File Nos. xxxxxx922 and xxxxxx852, with the present claim so that the impartial specialist will have a complete understanding of the claims involving his knees.²⁰ Thereafter, it shall refer appellant, an updated SOAF, and the medical record to a new impartial medical specialist to obtain a rationalized opinion on causal relationship. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

On appeal, counsel contends that OWCP failed to meet its responsibility to develop the medical evidence as it issued its April 4, 2017 decision without obtaining an adequate supplemental report from Dr. Zeidman. As explained, the case will be remanded to OWCP for selection of a new impartial medical examiner.

CONCLUSION

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

¹⁸ *Supra* note 10.

¹⁹ *M.B.*, Docket No. 09-0567 (issued November 12, 2009); *Nancy Keenan*, 56 ECAB 687 (2005); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(e) (September 2010) (if the referee physician does not respond, the claims examiner should request a new referee examination).

²⁰ *See id.* Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000). OWCP procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2017 is set aside, and the case is remanded for additional development consistent with this decision of the Board.

Issued: February 1, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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