United States Department of Labor
Employees' Compensation Appeals Board

A.D., Appellant	)	
and	)	**Docket No. 17-1855**
	)	**Issued: February 26, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Stratford, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
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 August 31, 2017 appellant, through counsel, filed a timely appeal from an August 4, 2017 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a right knee injury causally related to an accepted November 29, 2014 employment incident.

[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

On November 29, 2014 appellant then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, while delivering mail on November 29, 2014, he felt a pop in his right knee and was in severe pain and unable to walk. He stopped work on November 29, 2014.

Appellant was treated at an emergency room on November 29, 2014 by Dr. Charles Nolte, an osteopath, for evaluation of right knee injury with knee pain and decreased range of motion. He reported walking and delivering mail when he felt a pop in his knee. Findings on examination revealed intact motor and sensory responses in the lower extremities and tenderness to palpation of anterior knee. Dr. Nolte diagnosed knee sprain and pull to inner right knee while delivering mail. He noted that x-rays of the right knee revealed mild degenerative changes in the knee, large joint effusion, and large loose body in the knee joint.

By letter dated December 15, 2014, OWCP advised appellant that his claim was originally received as a simple, uncontroverted case and his claim was administratively handled to allow limited medical payments, but the merits of the claim were not formally adjudicated. It advised him that his claim would be formally adjudicated because he had not returned to full-time work. OWCP requested that appellant submit additional information including a comprehensive medical report from his treating physician which contained a reasoned explanation as to how the specific work factors or incidents contributed to his claimed injuries.

In a November 29, 2014 statement and again in an undated statement, appellant indicated that, while delivering his mail route on a certain street, he felt his right knee pop followed by severe pain. He was unable to continue walking due to pain and went to his mail truck and reported his injury to his supervisor. Appellant indicated that he did not have a preexisting right knee condition. Also submitted was a November 29, 2014 note from a physician assistant who saw him in an emergency room on November 29, 2014.

Appellant submitted a November 30, 2014 report from Dr. Adam Seidl, a Board-certified orthopedist, who treated him for right knee pain. He reported that, while delivering mail, he felt a click or pop in his knee and developed pain. Appellant noted having trouble bearing weight on the right leg and had pain with flexing and extending. His history was significant for bone spurs in his right knee when he was a teenager. Dr. Seidl noted right knee findings of mild effusion, limited range of motion, pain over the medial joint line, and mild crepitation. Right knee x-rays showed a loose body in the lateral compartment and mild-to-moderate osteoarthritis. Dr. Seidl diagnosed right knee loose body and possible medial meniscal tear. He provided appellant with a work status note indicating that he would have difficulty performing his normal duties. In work notes dated November 30 and December 18, 2014, Dr. Seidl advised that appellant was unable to work until he had a magnetic resonance imaging (MRI) scan. A December 11, 2014 right knee MRI scan dated revealed complex tear of the body and posterior horn of the medial meniscus.

Dr. Peter C. Vitanzo, Jr., Board-certified in sports medicine, provided a December 30, 2014 report noting his treatment of appellant for right knee pain. Appellant related that, while working on November 29, 2014, he felt a pop/pull in the right knee and had medial knee pain.

He noted having right knee surgery as a teenager. Right knee examination revealed good range of motion, crepitus in the knee joints, no effusion, and soreness over the medial joint line. Right knee x-rays revealed an intra-articular loose body which Dr. Vitanzo suspected was chronic and degenerative changes. He diagnosed right knee pain and opined that the patellofemoral arthritis was preexisting and the loose body was chronic. Dr. Vitanzo advised that the medial meniscal tear was consistent with the injury that appellant had at work. He advised that appellant was doing well and recommended rest and a return to full duty. In a December 30, 2014 note, Dr. Vitanzo diagnosed right knee medial meniscus tear, degenerative joint disease, and loose body. He indicated that appellant was totally disabled from December 30, 2014 to January 2, 2015 and could return to full duty January 3, 2015.

Appellant was treated by Dr. Paul Marchetto, a Board-certified orthopedist, on January 9, 2015, for right knee pain. He reported performing his mail carrier duties on November 29, 2014 when he fell and twisted his knee. Dr. Marchetto noted findings on examination of loss of terminal extension, medial joint pain, effusion, and tender joint line on the medial side. Right knee x-rays showed degenerative changes of the patellofemoral joint and a loose body in the anterior knee. Dr. Marchetto recommended arthroscopic removal of the loose body and debridement of the medial meniscus. In a January 9, 2015 note, he diagnosed loose body and recommended possible arthroscopy loose body removal. Dr. Marchetto advised that appellant was totally disabled from work.

In a January 22, 2015 decision, OWCP denied the claim, finding that appellant had not established that the claimed condition was causally related to the established incident.

On February 13, 2015 appellant requested an oral hearing, which was held before an OWCP hearing representative on August 27, 2015. Additional evidence was submitted. This included a January 29, 2015 duty status report (Form CA-17) in which Dr. Marchetto noted right knee findings of locking, catching, and pain with extension. He diagnosed loose body and meniscal tear. Dr. Marchetto found appellant disabled from work, noted that he failed conservative treatment, and recommended surgery. On February 10, 2015 he treated appellant for a work-related knee injury. Appellant reported delivering mail on November 29, 2014 and felt a right knee pop with a sudden onset of pain. An MRI scan revealed degenerative changes, a large loose body, and a meniscal tear. Dr. Marchetto opined that appellant most likely had underlying degenerative changes before the claimed November 29, 2014 injury, but the injury may have possibly worsened or at least aggravated any underlying knee issues. He recommended arthroscopic surgery.

On August 17, 2015 Dr. Marchetto noted appellant's injury at work on November 29, 2014 when he twisted his knee, felt a pop, and had an onset of medial right knee pain and loss of motion. Before this date appellant did not have any issues with his knee. Dr. Marchetto examined appellant on January 9, 2015 and noted that presentation was consistent with a medial meniscus tear and intra-articular loose body. These symptoms were a "new onset following [appellant's] this injury on November 29, [2015] and it can be reasonably stated that his injury on that date is directly related to his meniscal pathology." Dr. Marchetto again recommended surgery. In an August 17, 2015 note, he reiterated diagnoses and recommendations. Dr. Marchetto also that appellant was currently working full duty. In a September 27, 2015 report, he concluded with a reasonable degree of medical certainty that appellant's meniscal tear,

as well as osteochondral loose body, resulted from his claimed November 29, 2014 injury. Dr. Marchetto advised that appellant did have preexisting right knee degenerative changes. He opined with a degree of medical certainty that this injury exacerbated the degenerative changes. Dr. Marchetto noted that appellant reported no right knee symptoms before the November 29, 2014 injury.

In a November 13, 2015 decision, an OWCP hearing representative set aside the January 22, 2015 decision and remanded the case for further medical development. She found that Dr. Marchetto's August 17 and September 27, 2015 reports and treatment records implied that there was causal relationship between the right knee injury and the accepted work incident, warranting further development. The hearing representative instructed OWCP to refer appellant to a second opinion physician to address causal relationship.

Appellant submitted a duty status report from Dr. Marchetto dated September 18, 2015 who diagnosed degenerative joint disease, loose body, and meniscal tear. Dr. Marchetto returned appellant to work full-time regular duties on September 12, 2015.

On November 24, 2015 OWCP referred appellant to Dr. Lawrence I. Barr, a Board-certified orthopedic surgeon, to conduct a second opinion evaluation to determine the nature and extent of appellant's right knee condition. In a December 22, 2015 report, Dr. Barr discussed appellant's work history and stated that he had current complaints of right knee pain, swelling, and trouble with activities of daily living. Appellant denied prior injuries to his knee, but after reviewing the records, it jogged his memory that he had right knee arthroscopic surgery in 1990. Dr. Barr noted an MRI scan of the right knee revealed a complex medial meniscus tear, mild sprain of the medial collateral ligament, osteochondral loose body, moderate chondromalacia patella, and joint effusion. Examination revealed medial side tenderness of the femoral condyle and medial joint line, faint scars from the prior surgery, no effusion, no synovitis, intact strength, negative McMurray's drawer and Lachman's test, and crepitus with right knee flexion and extension. Dr. Barr diagnosed right knee degenerative joint disease. He indicated that appellant may benefit from having the loose body removed and a medial meniscectomy. Dr. Barr opined that with regard to the work occurrence appellant reached maximum medical improvement and no further treatment was indicated. Regarding causal relationship, he noted that appellant had preexisting degenerative joint disease of the right knee, a loose body and most likely a degenerative meniscal tear. Dr. Barr noted that the tear may be postsurgical in nature even though there was no mention of it on the MRI scan. He advised that the incident described was not consistent with the development of a meniscal tear or a loose body. Dr. Barr asserted that degenerative tears can be found without a history of trauma and he believed that this occurred in appellant's case. He noted that appellant was working full duty without restrictions. In a work capacity evaluation (OWCP-5c), Dr. Barr indicated that appellant reached maximum medical improvement and could perform his usual job without restrictions.

In a decision dated January 11, 2016, OWCP denied appellant's claim because the weight of the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related event.

On January 18, 2016 appellant requested an oral hearing which was held on April 25, 2016.

In a decision dated July 8, 2016, an OWCP hearing representative affirmed the January 22, 2016 decision.[3]

On May 8, 2017 appellant requested reconsideration and submitted additional evidence. In a January 4, 2017 report Dr. Todd M. Lipschultz, a Board-certified orthopedist, noted evaluating appellant on June 16 and November 7, 2016 for right knee symptoms after a right knee injury at work on November 29, 2014. He reviewed appellant's medical history and reiterated findings from the November 29, 2014 right knee x-ray and the December 11, 2014 right knee MRI. Dr. Lipschultz summarized the findings and opinions of Drs. Seidi, Vitanzo, and Dr. Marchetto. He also noted that appellant was seen by second opinion physician Dr. Barr on December 22, 2015 who opined that appellant had degenerative joint disease of his right knee. Dr. Lipschultz opined that he agreed with Dr. Marchetto that the need for knee arthroscopy was directly related to the accepted work incident of November 29, 2014. He advised that, before that date, appellant had no complaints of knee discomfort and he was able to function well. Dr. Lipschultz indicated that while at work he felt a pop in his right knee and developed pain, swelling, and restricted range of motion. Appellant was evaluated the same day and x-rays revealed a large joint effusion. He reported being evaluated the next day and was found to have medial joint line tenderness, joint effusion, and restricted range of motion. Appellant was diagnosed with a new medial meniscal tearing and old loose body. Dr. Lipschultz opined that, as a result of the November 29, 2014 work incident, appellant sustained a right knee medial meniscal tear with an aggravation of preexisting mild degenerative changes. He advised, within a reasonable degree of medical probability, that the knee arthroscopy was indicated and the need for knee arthroscopy was related to the work incident of November 29, 2014.

In a decision dated August 4, 2017, OWCP denied modification of its July 8, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 of FECA, that an injury was sustained 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must

[3] On January 4, 2017 appellant appealed to the Board. By letter dated May 8, 2017, counsel requested that the appeal be dismissed so that he could pursue reconsideration before OWCP. In an order dated July 18, 2017, the Board dismissed appellant's appeal. *Order Dismissing Appeal,* Docket No. 17-0493 (issued July 18, 2017).

[4] *Supra* note 2.

[5] *Gary J. Watling*, 52 ECAB 357 (2001).

submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[6]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, 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.[7]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[8] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.[9] When 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.[10]

ANALYSIS

The Board finds that this case is not in posture for a decision, as there remains an unresolved conflict in medical opinion between Dr. Barr, OWCP's referral physician, and Dr. Lipschultz, appellant's treating physician, regarding whether appellant sustained a right knee condition as a result of his November 29, 2014 accepted work incident.

In his December 22, 2015 report, Dr. Barr diagnosed degenerative joint disease of the right knee. He opined that appellant reached maximum medical improvement with regard to the work occurrence and no further treatment was indicated. Dr. Barr opined that appellant had preexisting degenerative joint disease of the right knee, a loose body and most likely a degenerative meniscal tear which he believed to be postsurgical in nature. He indicated that the work incident was not consistent with the development of a meniscal tear or a loose body. Dr. Barr advised that degenerative tears can be found without a history of trauma and he opined that this occurred in appellant's case. He indicated that appellant could perform his usual job without restrictions.

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[6] *T.H.*, 59 ECAB 388 (2008).

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] 5 U.S.C. § 8123(a); *see Y.A.,* 59 ECAB 701 (2008).

[9] 20 C.F.R. § 10.321.

[10] *V.G.,* 59 ECAB 635 (2008).

By contrast, Dr. Lipschultz, in his January 4, 2017 report, advised that, before the November 29, 2014 work incident, appellant had no complaints of knee discomfort and he was able to function well. Appellant indicated that while at work he felt a pop in his right knee and developed pain, swelling, and restricted range of motion. He was evaluated the same day and x-rays revealed a large joint effusion. Appellant was diagnosed with a new medial meniscal tearing and old loose body. Dr. Lipschultz opined that, as a result of the November 29, 2014 work incident, appellant sustained a right knee medial meniscal tear with an aggravation of preexisting mild degenerative changes. He further indicated that the knee arthroscopy was causally related to the work incident of November 29, 2014.

The Board, therefore, finds that a conflict in medical opinion has been created regarding whether appellant's right knee conditions are caused or aggravated by the accepted work incident of November 29, 2014. Section 8123 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.[11]

The case will be remanded to OWCP to refer appellant, the medical record, and a statement of accepted facts to an appropriate specialist, to obtain an impartial medical opinion regarding whether the claimed November 29, 2014 work injury caused or aggravated the diagnosed right knee conditions. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

CONCLUSION

The Board finds the case not in posture for decision.

[11] *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision.

Issued: February 26, 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