

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

R.H., Appellant

and

**U.S. POSTAL SERVICE POST OFFICE,
Malden, MA, Employer**

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**Docket No. 17-1477
Issued: March 14, 2018**

Appearances:
*Benjamin R. Zimmermann, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2017 appellant, through counsel, filed a timely appeal from a June 8, 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.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. 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 Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated November 24, 2017, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1477 (issued November 24, 2017). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

ISSUE

The issue is whether appellant has met his burden of proof to establish bilateral knee osteoarthritis causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On September 8, 2014 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that the physical activities of his federal employment had an adverse effect on his knees, requiring two knee replacements. He listed his employment duties as carrying mail and tubs of flats weighing up to 40 pounds, standing and casing mail for two to three hours a day, and walking five to six miles a day while delivering mail for at least six hours. Appellant noted that these duties required constant bending, stooping, lifting, and working in weather from extreme heat to extreme cold. He further noted that the sidewalk and stairs he walked on were sometimes extremely slippery. Appellant listed the nature of his disease or illness as acceleration of osteoarthritis, bilateral knees. He did not stop work.

In a March 9, 2011 report, Dr. Jeffrey A. Polansky, a Board-certified orthopedic surgeon, noted that appellant worked as a mailman. He related that appellant's physical examination demonstrated decreased flexion and extension of both knees with severe varus deformity and an x-ray examination showed significant medial compartment collapse bilaterally. Dr. Polansky released appellant to return to work a normal schedule, but restricted him from use of a push cart due to his bilateral osteoarthritis of his knees.

Appellant submitted a number of reports from his treating physician, Dr. Arnold D. Scheller, a Board-certified orthopedic surgeon. In a July 20, 2011 report, Dr. Scheller noted that appellant complained of pain in his right knee which he described as moderate to severe. His symptoms were listed as joint stiffness, swelling, decreased range of motion, catching, grinding, popping/crepitus, locking, as well as instability, and muscle weakness. Dr. Scheller diagnosed right knee osteoarthrosis. He referred appellant to pain management for a facet injection.

In a November 28, 2011 x-ray of appellant's right knee, Dr. Mihran Artinian, a Board-certified radiologist, diagnosed severe osteoarthritic changes involving the medial compartment of the right knee with varus deformity. He also noted moderate-to-severe degenerative disc disease of the patellofemoral compartment with patellar spurring and that soft tissue calcifications were present lateral to the femoral epicondyle. Dr. Artinian concluded that appellant had moderate-to-severe osteoarthritic changes involving both medial tibiofemoral compartments, right more than left, with bilateral varus deformities.

By report dated May 8, 2012, Dr. Scheller noted that appellant's onset of left knee pain had been gradual. He continued to submit progress notes with regard to his treatment of appellant.

On May 16, 2012 Dr. Joel S. Newman, a Board-certified radiologist, found that appellant's left knee showed tricompartmental osteoarthritis, greatest in the medial femorotibial compartment with mild-to-moderate varus angulation of the knee.

Appellant continued to seek treatment with Dr. Scheller. In a January 22, 2014 report, Dr. Scheller summarized his treatment of appellant, as well as appellant's medical history. He noted that appellant had a series of injections to his knees in 2007, 2009, 2010, and 2011. Dr. Scheller indicated that he performed a total right knee replacement on December 15, 2011 and a total left knee replacement on June 7, 2012. He reviewed appellant's job description and opined that there was clear causation as to the employment-related activities, which accelerated the arthritic disease in both knees eventually requiring treatment of bilateral total knee replacements. Dr. Scheller explained that his initial review of appellant's x-rays showed severe arthritis. He noted that appellant had bilateral knee stiffness at the end of long days, and swelling more on the left side than right, but that in spite of his discomfort, appellant was able to work his schedule as a letter carrier.

Dr. Scheller reported that appellant had undergone bilateral total knee replacements for end-stage degenerative arthritis, which was aggravated by his work activities. He explained that the arthritic process was accelerated by appellant's employment. Dr. Scheller noted that arthritis was a failure and loss of articular cartilage. He indicated that appellant's job as a letter carrier required constant repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting. Dr. Scheller opined that it was the impact loading and the constant and continuous repeated local stressors regularly occurring over the course of the workday which was repeated day after day that accelerated progression of the underlying arthritis. The medical process by which this occurred was that the impact loading resulted in chronic inflammation and accelerated the loss of articular cartilage. As the articular cartilage deteriorated due to these mechanical stresses, breakdown products from the cartilage were released and this resulted in persistent intermittent swelling and effusions in the knee. Dr. Scheller also noted that bone outgrowth then formed on the margins of the joints to help distribute the abnormal forces, and that these bone changes together with inflammation can be both painful and debilitating and were characteristic of progressive osteoarthritis. He also noted that arthroplasty itself created a permanent aggravating condition. Based on all above factors, Dr. Scheller concluded that appellant's employment activity contributed to acceleration of his arthritic condition leading to his bilateral total knee replacements.

By development letter dated December 1, 2014, OWCP informed appellant that additional medical evidence was necessary to establish his claim and afforded him 30 days to submit this evidence.

On March 27, 2015 OWCP referred appellant's case to an OWCP medical adviser for a rationalized medical opinion as to whether appellant's federal work activities caused his bilateral knee conditions. In a response of the same date, Dr. Morley Slutsky, a physician Board-certified in occupational medicine, acting as an OWCP medical adviser, reviewed the medical evidence and opined that none of the evidence discussed appellant's history or how his symptoms occurred in relation to his work. With regard to Dr. Scheller's January 22, 2014 report, Dr. Slutsky reported that, although Dr. Scheller indicated that appellant's bilateral total knee replacement was employment related and that there was clear causation to his employment-related activities, he did not discuss how appellant developed symptoms/findings in relation to the employment duties. Dr. Slutsky did opine that, as appellant had significant osteoarthritis in both knees, which resulted in pain and limitations and had failed all reasonable attempts at conservative treatment, he required the bilateral knee replacements he had undergone. However, he felt that additional evidence was required from appellant before he could fully render an

opinion. Dr. Slutsky was provided appellant's narrative statement on April 10, 2015, but was still unable to render an opinion.

Appellant's case was, therefore, forwarded to Dr. David I. Krohn, a Board-certified internist and an OWCP medical adviser. In April 19, 2015 report, Dr. Krohn opined that the predominant cause of appellant's right knee osteoarthritis was not related to his employment, but rather to a significant nonwork-related injury to the right knee, as well as the arthroscopic surgery performed on that knee. He noted that Dr. Scheller provided no mention of a prior right knee medial meniscectomy, a prior nonemployment-related injury that caused the injury, or the nature of the prior injury to the left knee that he mentioned on May 8, 2012. Dr. Krohn noted that the American Medical Association, *Guides to the Evaluation of Disease and Injury Causation* (2d ed. 2013) (A.M.A., *Guides*) provided that nonoccupational risk factors for which there was strong or very strong evidence for causal relationship to the development of osteoarthritis, included previous trauma, previous meniscectomy or meniscal injury, as well as age and being overweight. He opined that these factors far outweighed any contribution by activities that were performed by appellant in his federal employment. Dr. Krohn also noted that there was no mention of any specific work-related trauma by appellant in the multiple detailed orthopedic evaluations since 2007 and argued strongly against a work-related causal relationship for the development of bilateral severe osteoarthritis sufficient to require bilateral arthroplasty. Further, he noted that appellant developed bilateral knee osteoarthritis sufficiently severe as to require total knee arthroplasty, which in his opinion spoke to a genetic predisposition in development of knee osteoarthritis in which the "wear and tear" of any occupation would have eventually resulted in bilateral total knee arthroplasty. Dr. Krohn opined that bilateral knee replacements were medically necessary due to the severity of appellant's bilateral knee osteoarthritis, but were not causally related to his federal employment.

By decision dated April 21, 2015, OWCP denied appellant's claim. It noted that the medical evidence of record established that he experienced the alleged employment factors and that a medical condition had been diagnosed. However, OWCP denied appellant's claim because causal relationship had not been established.

On May 4, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. By letter dated October 30, 2015, counsel instead requested a review of the written record.

By decision dated January 21, 2016, OWCP's hearing representative set aside the April 21, 2015 decision. She found that an unresolved conflict existed between OWCP's medical adviser Dr. Krohn and treating physician Dr. Scheller. The case was, therefore, remanded for an impartial medical examination to determine whether appellant's medical condition affecting the lower extremities was caused, aggravated, or accelerated by factors of his federal employment. The impartial medical examiner was also to provide an opinion explaining whether the accepted employment factors caused or contributed to the need for bilateral knee replacement surgeries.

By letter dated October 5, 2016, OWCP referred appellant to Dr. Murray Goodman, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 10, 2016 report, Dr. Goodman noted that appellant had worked for the employing establishment since 1993 as a letter carrier. He discussed appellant's medical history and conducted a physical

examination. Dr. Goodman opined that appellant's bilateral knee osteoarthritis was neither causally related to his work as a letter carrier, nor was it permanently aggravated by that occupation. He noted that it was significant that appellant underwent bilateral arthroscopic meniscectomies more than 20 years prior to his knee arthroplasties. Dr. Goodman further noted that it was well known that postmeniscectomy knees have a high incidence of development of osteoarthritis and this frequently takes 15 to 20 years to develop. He opined that this was the major predisposing factor to his need for total knee arthroplasty in his opinion. Dr. Goodman noted that, although the pathophysiology of osteoarthritis cited by Dr. Scheller in his report was correct, the etiology in the present case was not employment related. He noted that the A.M.A., *Guides* indicate that there was strong evidence for previous meniscectomy or meniscus injury as an accepted risk factor for arthritis. Dr. Goodman noted that the same source sites insufficient evidence for standing and walking as a causative factor. He also explained that the lack of any one specific injury at work also mitigated against an occupational causal relationship and the fact that he lost no time from work mitigated against his occupation being an aggravating factor.

By decision dated June 8, 2017, OWCP denied appellant's claim as he had not established causal relationship between the accepted employment factors and his diagnosed medical conditions.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 the 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.⁵ 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.⁶

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 must include 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

⁴ *Supra* note 2.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *See Irene St. John*, 50 ECAB 521 (1999).

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) provides that, if there is a 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. 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.⁹ In situations 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.¹⁰

ANALYSIS

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

Appellant alleged that he sustained bilateral knee osteoarthritis due to his federal employment duties as a letter carrier. OWCP accepted that he performed the employment duties alleged. Appellant's treating physician, Dr. Scheller, explained in detail how appellant's specific work activities caused impact loading to his knees and how he experienced repeated local stressors over the course of the workday that accelerated the progression of his underlying arthritis. OWCP's medical adviser, Dr. Krohn reviewed the case record and cited the A.M.A., *Guides* for the proposition that appellant's nonoccupational risk factors, including his prior meniscectomies, far outweighed any contribution appellant's work activities had to the development of his bilateral knee osteoarthritis. OWCP thereafter declared a conflict in the medical opinion evidence and referred appellant to Dr. Goodman for an impartial medical evaluation.

The Board finds, however, that OWCP improperly determined that there was a conflict in medical opinion between Dr. Krohn and Dr. Scheller on the issue of whether appellant sustained an injury causally related to the accepted factors of his federal employment. A simple disagreement between two physicians does not, of itself, establish a conflict. A conflict only exists when there are opposing medical reports of virtually equal weight and rationale.¹¹

The Board notes that there is no requirement that the federal employment be the only cause of appellant's condition. An employee is not required to prove that occupational factors

⁷ *Id.*

⁸ *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

⁹ 20 C.F.R. § 10.321.

¹⁰ *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

¹¹ *See Robert D. Reynolds*, 49 ECAB 561 (1998).

are the sole cause of his or her claimed condition. If work-related exposures caused, aggravated, or accelerated appellant's condition, he is entitled to compensation.¹² While implying that appellant's employment activities could have contributed in some degree to the development of his bilateral knee osteoarthritis, Dr. Krohn did not explain why causal relationship did not exist. His opinion was, therefore, insufficiently rationalized to create a conflict with the opinion of Dr. Scheller.

Due to the lack of a conflict in the medical evidence at the time of the referral to Dr. Goodman for an impartial medical examination, Dr. Goodman actually served as an OWCP referral physician rather than an impartial medical specialist.¹³ Even though the report of Dr. Goodman is thus not entitled to the special weight afforded to the opinion of an impartial medical specialist, his report can still be considered for its own intrinsic value.¹⁴

The Board, however, finds the opinion of Dr. Goodman is insufficient to carry the weight of the medical evidence of record. Dr. Goodman noted that appellant was employed as a letter carrier, but did not discuss appellant's specific work duties. Rather, he simply relied on the general principles found in the A.M.A., *Guides* when finding that there was insufficient evidence to support that certain work factors caused osteoarthritis in appellant's knees. The Board has held that newspaper clippings, medical texts, and excerpts from publications are of no evidentiary value in establishing causal relationship between a claimed condition and an employee's federal employment. Such materials are of general application and are not determinative as to whether the specific condition claimed is related to the particular employment factors alleged by the employee.¹⁵

It is well-established that proceedings under FECA are not adversarial in nature and that although claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶ Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.¹⁷ As Dr. Goodman's opinion is insufficiently rationalized, further development is required to determine whether appellant's bilateral knee conditions were caused or aggravated by the accepted factors of his federal employment. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹² *E.R.*, Docket No. 16-1634 (issued May 25, 2017).

¹³ *See G.K.*, Docket No. 09-1222 (issued January 15, 2010).

¹⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁵ *G.N.*, Docket No. 16-1327 (issued December 27, 2016); *see also William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁶ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁷ *Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this opinion.

Issued: March 14, 2018
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