

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

D.L., Appellant)	
)	
and)	Docket No. 18-0629
)	Issued: November 16, 2018
DEPARTMENT OF STATE, CHICAGO)	
PASSPORT OFFICE, Chicago, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 January 31, 2018 appellant, through counsel, filed a timely appeal from a November 6, 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 to consider the merits of this case.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a consequential left knee condition causally related to her accepted July 1, 2013 employment injury.

FACTUAL HISTORY

On July 3, 2013 appellant, then a 54-year-old passport specialist, filed a traumatic injury claim (Form CA-1) alleging that on July 1, 2013 she sustained a right knee injury as the result of striking her right knee on the left-hand corner of a counter wall while in the performance of duty. She stopped work on July 5, 2013 and returned to light-duty work on June 30, 2014. By decision dated October 8, 2014, OWCP accepted the claim for right medial meniscus tear.³ It authorized right knee arthroscopic surgery, partial medial and lateral meniscectomies, plica excision, and patellofemoral microfracture, which was performed on September 30, 2013.

In a February 13, 2014 report, Dr. John Martin Leland, III, an examining physician Board-certified in orthopedic surgery and sports medicine, noted that as a result of appellant's right knee pain and decreased mobility, she developed left knee pain due to increased compensation and use.

In a report dated July 17, 2014, Dr. Leland diagnosed left knee meniscal tear with chondral damage. He related that this condition was an inadvertent consequence of the accepted July 1, 2013 work injury. In work capacity evaluation forms (Form OWCP-5c) dated July 17 and August 12, 2014, Dr. Leland diagnosed left knee meniscal tear with chondral damage. He indicated that appellant was capable of light-duty work and provided work restrictions.

Dr. Leland, in an August 6, 2014 report, reiterated his opinion that appellant's left knee medial meniscus tear with chondral damage was a consequence of the accepted July 1, 2013 work injury.

In a report dated October 13, 2014, Dr. David H. Garelick, a Board-certified orthopedic surgeon acting as a district medical adviser (DMA), reviewed Dr. Leland's reports and determined that there was no consequential left knee condition. In support of his opinion, he observed that the condition was more likely due to appellant's age as there was no reported left knee injury. Moreover, there was no medical literature supporting that increased walking and pressure causes meniscal tears.

On May 14, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), list of questions, and medical evidence, to Dr. Gary Klaud Miller, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Leland and Dr. Garelick regarding a possible consequential left knee injury.

In a June 5, 2015 report, Dr. Miller, based on a review of the SOAF, injury history, medical reports, appellant's complaints, and diagnostic and medical evidence, noted that OWCP had accepted a right medial meniscus tear due to the accepted July 1, 2013 work injury. While he had not been asked to address the right knee, he opined that it was more likely than not that the only

³ Appellant retired from the employing establishment effective April 3, 2015.

injury she sustained as a result of the accepted July 1, 2013 work injury was a contusion. For a conclusive opinion on whether appellant sustained a right knee injury, Dr. Miller noted that he would need additional records. He observed that appellant developed left knee symptoms while being out of work. A physical examination of the left knee revealed a normal sensory examination, trace left knee effusion, good range of motion, crepitation, and tenderness. Dr. Miller also reported a bilateral guarded gait. He concurred with Dr. Garelick that there was no scientific evidence supporting that compensation for one knee would cause degenerative changes in the other knee. Dr. Miller attributed the left knee condition to aging.

By decision dated August 14, 2015, OWCP denied appellant's claim for a consequential left knee injury. It found that the special weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Miller, who had been selected to resolve the conflict in the medical opinion evidence.

Appellant timely requested an oral hearing before an OWCP hearing representative, which was held on December 21, 2015.

By decision dated February 8, 2016, an OWCP hearing representative affirmed the denial of appellant's consequential injury claim. He accorded special weight to Dr. Miller's opinion as he found the opinion well rationalized in explaining why there was no consequential left knee condition causally related to the accepted July 1, 2013 employment injury.

A January 7, 2013 x-ray of appellant's left knee revealed moderate osteoarthritis.

An April 11, 2014 magnetic resonance imaging scan of appellant's left knee revealed small-to-moderate joint effusion with Baker's cyst, medial meniscus posterior horn complex, degenerative undersurface tearing, and chondromalacia medial tibiofemoral compartment degenerative arthritic changes.

A February 19, 2016 x-ray interpretation of appellant's left knee revealed mild-to-moderate tricompartmental osteoarthritis.

In a February 19, 2016 report, Dr. Sherwin S.W. Ho, a physician Board-certified in orthopedic surgery and sports medicine, noted that appellant had a left knee arthroscopy with lateral and partial medial meniscectomies and microfracture in 2014. Since the surgery appellant had been doing well except for episodes of left knee clicking on extension. Physical findings included normal range of motion.

In progress notes dated March 16, 2016, Dr. Ho and Dr. Harpreet S. Bawa, an orthopedic surgeon, noted that appellant was seen for a follow-up examination of her left knee. They detailed the history of the condition and provided examination findings. Dr. Ho and Dr. Bawa wrote that it was possible appellant might experience some left knee symptoms secondary to a right knee injury. They explained that this was a result of increased load on left knee and exacerbation of her left knee symptoms "or causing the meniscal pathology." As to appellant's left knee clicking, Dr. Ho and Dr. Bawa attributed it to the patellofemoral joint and chondromalacia.

On January 19, 2017 OWCP received appellant's January 10, 2017 request for reconsideration.

By decision dated April 19, 2017, OWCP denied modification. It found Dr. Ho's opinion was insufficient to create a new conflict in the medical opinion evidence as he failed to explain why appellant's left knee condition was consequential to her accepted right knee condition.

On August 8, 2017 counsel requested reconsideration and submitted additional evidence.

Dr. Ho, in a May 25, 2017 report, opined that appellant's preexisting left knee meniscus tear and media compartment arthritis, were aggravated by her accepted July 1, 2013 employment injury, right knee surgery, and rehabilitation.

In a July 25, 2017 report, Dr. Ho explained that when there is a preexisting left knee disease such as meniscal tear and chondromalacia, any increased left knee weight-bearing would cause increased stress and loading on the damaged subchondral bone and articular cartilage and increased wear of the cartilage or arthritis. The increased stress and loading would cause inflammation and pain. Dr. Ho noted that appellant developed an antalgic gait as a result of the right knee injury, increased weight bearing on the left knee, and right knee surgery, which further increased the weight on the left knee.

By decision dated November 6, 2017, OWCP denied modification. It found that Dr. Ho failed to adequately explain the mechanism by which appellant's right knee condition resulted in a consequential left knee condition.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.⁴ The basic rule is that a subsequent injury, whether 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.⁵ With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.⁶

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty supported by sound medical rationale

⁴ *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994); *John R. Knox*, 42 ECAB 193 (1990).

⁵ *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

⁶ *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁷

Section 8123(a) 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 When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.⁹ Where a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁰

ANALYSIS

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence.

OWCP properly determined that there was a conflict in the medical opinion evidence between the DMA, Dr. Garelick, and Dr. Leland, a treating physician, as to whether appellant sustained a left knee condition as a consequence of her accepted right knee injury. It thereafter referred her to Dr. Miller for an impartial medical evaluation to resolve this issue.¹¹ OWCP denied appellant's claim finding that his medical opinion was entitled to special weight as an impartial medical examiner.

The Board finds that Dr. Miller's report does not constitute a well-rationalized opinion on the question of whether appellant sustained a left knee injury as a consequence of her accepted right knee condition for the following two reasons.

First, in his June 5, 2015 report, Dr. Miller opined that appellant only sustained a right knee contusion as a result of the accepted July 1, 2013 employment injury and questioned the acceptance of right knee medial meniscus tear. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. OWCP clearly accepted appellant's claim for right knee medial meniscus tear. When it has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted facts. In *Paul King*¹² the Board found that the report of an impartial medical

⁷ *J.B.*, Docket No. 14-1474 (issued March 13, 2015).

⁸ 5 U.S.C. § 8123(a). See *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁹ *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

¹⁰ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹¹ *Supra* note 9.

¹² 54 ECAB 356 (2003).

examiner who disregarded a critical element of the SOAF was of diminished probative value. In *King*, the impartial medical examiner also disagreed with the medical basis for acceptance of a condition. The Board found that this defective report was insufficient to resolve the existing conflict of medical opinion evidence. Therefore, Dr. Miller's report is similarly of diminished probative value.

Second, the Board also notes that Dr. Miller concurred with the DMA's opinion and generally indicated that the medical literature did not support that compensating for an injured lower extremity would cause an injury to the opposite side. Dr. Miller, however, did not describe the medical literature to which he referred or explain how it applied to the specific facts of appellant's case.¹³ His opinion in this regard is therefore of limited probative value. The medical evidence of record from appellant's treating physicians indicates that appellant placed extra pressure on her left leg to compensate for her right leg employment injury. Dr. Miller did not adequately discuss or explain why placing extra weight on the left leg due to the employment-related right leg injury would not have been competent to bring about a consequential injury to her left knee. He opined that appellant's left knee condition was solely due to a nonwork-related degenerative process, but he did not adequately explain this opinion.

For the reasons discussed above, Dr. Miller's opinion is insufficient to resolve the conflict in medical opinion as the special weight of the medical opinion evidence regarding this matter does not presently rest with his opinion and there is an unresolved conflict in the medical opinion evidence. On remand, OWCP shall request that he provide a well-rationalized supplemental opinion based upon the accepted facts of this case. If Dr. Miller is unavailable or unwilling to render a supplemental opinion, it shall refer appellant, medical records, and SOAF to a new impartial medical specialist.¹⁴ Following this and any necessary further development, OWCP shall issue a *de novo* decision.

On appeal, counsel asserts that Dr. Ho provided a rationalized opinion explaining why appellant sustained a consequential left leg condition. In view of the Board's decision to remand for further development and a *de novo* decision, the Board finds counsel's argument premature.

CONCLUSION

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

¹³ *Ruby I. Fish*, 46 ECAB 276 (1994).

¹⁴ *See Willa M. Frazier*, 55 ECAB 379 (2004); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with the decision of the Board.

Issued: November 16, 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