

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

---

**M.B., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ABERDEEN  
PROVING GROUND, Aberdeen, MD, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 17-0770  
Issued: October 29, 2018**

*Appearances:*  
*Toby Rubenstein*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 23, 2017 appellant, through her representative, filed a timely appeal from a November 8, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board has jurisdiction under the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met her burden of proof to establish an aggravation of preexisting left knee arthritis causally related to factors of her federal employment.

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 28, 2011 appellant, then a 59-year-old human resources specialist, filed an occupational disease claim (Form CA-2) alleging that she aggravated her preexisting, post-traumatic, left-knee arthritis while working, and that frequent travel and increased walking accelerated her need for a total left knee replacement.<sup>3</sup> She noted that she first became aware of her claimed condition on November 3, 2008 and first attributed it to her federal employment on November 21, 2008.

By development letter dated August 4, 2011, OWCP requested that appellant provide evidence in support of her claim. It advised her of the type of factual and medical evidence required and attached a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary information.

In support of her claim, appellant provided narrative statements which noted that her work unit moved into a new facility on November 3, 2008. She alleged that her knee subsequently became more symptomatic due to the increased walking. Appellant asserted that, “Although the post-traumatic arthritis was progressively getting worse over prior years due to travel requirements, the lack of accommodations and size of the new building rapidly accelerated my condition.” She alleged that from November 3 to December 18, 2008 she went from walking short distances without a limp to needing a wheelchair full time. On November 21, 2008 appellant’s physician recommended a total knee replacement. Appellant traveled frequently for work from 2006 through 2008. By December 2008, she could no longer travel due to pain. Appellant underwent total left knee replacement surgery in March 2009 and retired from the employing establishment on October 2, 2009.

Appellant noted a history of injury in which she sustained a left leg crush injury and right clavicle fracture in a nonwork motor vehicle accident on October 8, 2000 and was wheelchair-bound for two years. She had an additional motor vehicle injury in August 2007, which resulted in neck and shoulder spasms, and a left-foot fracture. Appellant underwent several left knee surgeries before the March 2009 total replacement.

By letter dated August 2, 2011, the employing establishment controverted appellant’s claim asserting that she was accommodated for all of her medical needs. It noted that she was given the opportunity to decline travel due to health reasons, but advised that she preferred to make the trips. The employing establishment further noted that appellant’s duty station built in 2009 was a one-level building with no steps and no ramps, and the bathrooms were handicap accessible.

Appellant submitted medical evidence in support of her claim.

---

<sup>3</sup> The present claim was assigned OWCP File No. xxxxxx352. Appellant had additional claims before OWCP. OWCP File No. xxxxxx321 was accepted for aggravation of left knee arthritis and knee replacement due to an injury during a fire drill. OWCP File No. xxxxxx282 was accepted for aggravation of left knee post-traumatic arthritis due to walking to a bus at an airport. OWCP File No. xxxxxx480 was accepted for aggravation of depressive disorder, post-traumatic stress disorder, panic disorder, and phobia. These other claims have not been administratively combined with the present claim and are not presently before the Board.

In a May 2, 2011 report, Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, noted appellant's history of the motor vehicle accidents and the resulting injuries which left her confined to a wheelchair. He reviewed her list of work activities and opined that work factors such as walking and traveling aggravated her preexisting, post-traumatic arthritis and accelerated the knee replacement surgery.

By decision dated October 26, 2011, OWCP denied appellant's occupational disease claim. It found that appellant had not submitted medical evidence diagnosing a condition resulting from employment activities.

Appellant, through counsel, requested an oral hearing, held on October 28, 2011. By decision dated February 2, 2013, an OWCP hearing representative vacated the October 26, 2011 decision and remanded the case for further medical development.

In an April 25, 2012 statement of accepted facts (SOAF), OWCP noted appellant's retirement, the accepted conditions in her other claims, and her nonwork-related motor vehicle accidents in 2000 and 2007.

On August 17, 2012 OWCP referred appellant to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On January 11, 2013 OWCP updated the SOAF to note that appellant attributed the aggravation of her underlying knee arthritis to excessive walking beginning November 3, 2008. It further noted that she was required to travel and made approximately 10 trips a year from 2006 through 2008. OWCP noted in November 3, 2008 the employing establishment moved to a new building such that appellant's handicapped parking spot was 300 feet from her desk, while in the previous location it had been 25 to 45 feet. It also noted that office equipment and supplies were located further from her desk in the new building. OWCP reported that appellant used a wheelchair when working on a regular basis beginning in December 2008.

On January 15, 2013 OWCP requested a supplemental report from Dr. Thompson based on the revised SOAF. In a report dated March 5, 2013, Dr. Thompson reviewed the amended SOAF and again opined that appellant's left knee condition was not causally related to factors of her federal employment. He found that she was not required to perform an excessive amount of walking, kneeling, crawling, standing, or other activities which would have resulted in anything more than a temporary aggravation of her preexisting condition which would have resolved within a brief period of time with appropriate treatment.

By decision dated May 22, 2013, OWCP denied appellant's claim, finding that Dr. Thompson's second opinion report negated a permanent, work-related aggravation of her preexisting left knee arthritis.

Appellant again requested an oral hearing, which was held on October 29, 2013.<sup>4</sup> By decision dated December 23, 2013, OWCP's hearing representative vacated the May 22, 2013

---

<sup>4</sup> During the hearing, counsel argued, among other things that OWCP improperly declined to address appellant's request for assistance in communication with Dr. Thompson as an accommodation under FECA Bulletin No. 12-05.

decision and remanded the case for OWCP to address appellant's request for accommodations under FECA Bulletin No. 12-05.

On July 31, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Steven J. Valentino, an osteopath and Board-certified orthopedic surgeon, and provided an updated SOAF which included the varying size of the employing establishment's buildings, the amount of time she spent in work travel, and the accepted aggravations of her left knee and emotional condition.

In an August 19, 2014 report, Dr. Valentino noted his review of appellant's medical records and her assertion that work-related job duties aggravated her preexisting left knee osteoarthritis. He described the progression of her knee problems and opined in an August 19, 2014 report that her significant left knee injury and surgical intervention left her with a significant step-off about the lateral tibial plateau resulting in her post-traumatic arthritis and subsequent need for knee replacement. Since then, appellant's knee condition had attained maximum medical improvement. Dr. Valentino stated that her work activities caused "no significant aggravation of her post-traumatic arthritic changes about her left knee" and that her diagnosed condition was "not medically connected" to work factors.

By decision dated January 26, 2015, OWCP denied appellant's occupational disease claim, finding that Dr. Valentino's report, which found no causal relationship between her employment duties and her preexisting, post-traumatic left knee osteoarthritis, carried the weight of the medical evidence.

Appellant, through her representative, requested reconsideration on December 8, 2015, arguing that a conflict of medical opinion existed between Drs. Valentino and Zamarin and that Dr. Thompson's reports should have been excluded from the record. The representative also submitted additional medical evidence.

In an April 29, 2015 report, Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon, noted his review of the SOAF and appellant's work activities. He diagnosed left knee post-traumatic arthritis with total knee replacement, left leg peroneal nerve injury and complex regional pain syndrome (CRPS), and denervation of the proximal tibio-fibular joint and resection of a neuroma of the patellar branch of the saphenous nerve he opined that because appellant had to walk great distances and climb stairs, which increased the stress on her knee, her employment aggravated and accelerated her underlying knee conditions.

On July 1, 2015 Dr. Zamarin opined that appellant's work required her to travel which necessitated walking, standing, and climbing stairs. These activities aggravated the post-traumatic arthritis in her left knee and accelerated the need for total left knee replacement.

Dr. Franklin E. Caldera, an osteopath and a Board-certified physiatrist, examined appellant on December 6, 2015, reviewed the SOAF and the additional work duties that she felt contributed to her condition. He opined that her travel, walking for long distances, and prolonged standing caused an aggravation of the post-traumatic arthritis in her left knee, accelerating the need for a replacement.

On March 25, 2016 OWCP found that a conflict of medical opinion existed between second opinion physician Dr. Valentino and appellant's treating physicians Drs. Caldera, Kaufman, and Zamarin regarding whether her employment activities aggravated her preexisting left knee arthritis or CRPS. It referred appellant, along with a set of questions, to Dr. William Emper, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 21, 2016 report, Dr. Emper reviewed the August 12, 2014 SOAF and all medical records. He described appellant's October 2000 motor vehicle accident resulting in a comminuted tibial plateau fracture and two accepted work-related aggravations. After a physical examination, Dr. Emper opined that her knee replacement was due to her preexisting degenerative arthritis and that the natural progression of the arthritis required left total knee replacement surgery.<sup>5</sup> He found no objective medical evidence to substantiate appellant's claim that the work environment or any work injury resulted in permanent exacerbation of the preexisting, post-traumatic degenerative arthritis. Dr. Emper concluded that her degenerative knee arthritis was not connected to her work activities by direct cause, aggravation, precipitation, or acceleration.

By decision dated November 8, 2016, OWCP denied appellant's claim, finding that she had not submitted medical opinion evidence sufficient to establish causal relationship between her diagnosed left knee condition and her employment duties.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the facts that the individual is an "employee of the United States," that the claim was timely filed, that an injury was sustained in the performance of duty, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>7</sup>

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."<sup>8</sup> 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 the claimant identified 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.

---

<sup>5</sup> Appellant's treating physician accompanied her to the impartial medical examination.

<sup>6</sup> *Supra* note 2.

<sup>7</sup> *Supra* note 2. Kathryn Haggerty, 45 ECAB 383, 388 (1994).

<sup>8</sup> 20 C.F.R. § 10.5(q).

A medical report has probative value only when supported by medical rationale,<sup>9</sup> which includes a physician's detailed opinion on whether causal relationship exists between the claimant's diagnosed condition and the implicated employment activity. The physician's opinion 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 specific employment activity or factors the claimant identified.<sup>10</sup> The claimant's belief that employment caused or aggravated the claimed condition is insufficient to establish a causal relationship.<sup>11</sup>

When there are opposing reports of virtually equal weight and rationale, OWCP will refer the case to an impartial medical examiner under section 8123(a) of FECA which provides that the Secretary shall appoint a third physician to resolve the conflict of medical opinion between the employee's physician and OWCP's referral physician.<sup>12</sup> For this referee examination, OWCP will select a physician qualified in the appropriate specialty who has had no prior connection with the case.<sup>13</sup>

Where the case is referred to an impartial medical examiner to resolve the conflict between opposing medical reports of virtually equal weight and rationale, the specialist's opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>14</sup>

### ANALYSIS

The Board finds that appellant has not established that her left knee condition was caused or aggravated by factors of her federal employment.

Based on an SOAF detailing appellant's work history, physical examination, and medical evidence record, impartial medical examiner Dr. Emper, in his April 21, 2016 report, determined that her left knee condition was due to preexisting degenerative arthritis whose natural progression eventually required the knee replacement. Dr. Emper found no objective medical evidence indicating that her work duties or any work injury such as the accepted aggravations resulted in a permanent occupational condition. Therefore, he concluded that the degenerative knee arthritis was not causally connected to federal employment.

Because Dr. Emper had full knowledge of the relevant facts, evaluated the course of appellant's condition, is a specialist in his field, and based his conclusion on a comprehensive review of the factual and medical history as well as his own physical examination, the Board

---

<sup>9</sup> *T.F.*, 58 ECAB 128 (2006).

<sup>10</sup> *A.D.*, 58 ECAB 149 (2006).

<sup>11</sup> *Lourdes Harris*, 45 ECAB 545, 547 (1994).

<sup>12</sup> *Supra* note 2; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>13</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>14</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

finds that his opinion constitutes the special weight of the medical evidence.<sup>15</sup> Accordingly, appellant has not established causal relationship between her work duties and her claimed knee condition.

On appeal, appellant's representative contends that the impartial medical examiner's report did not constitute the weight of the medical evidence, that a second opinion report should have been excluded from the record, that OWCP did not grant appellant's accommodations request during the impartial examination, and the SOAF was not comprehensive. The Board finds no evidence of record to support her arguments on appeal. Appellant was accompanied to the impartial medical examination by her treating physician, and the SOAF included all pertinent work factors. As explained above, Dr. Emper's report was well-rationalized and based on a thorough review of the case record. The Board thus finds that OWCP properly afforded the special weight of the medical evidence to the impartial medical examiner.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not established an aggravation of preexisting left knee arthritis causally related to factors of her federal employment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.<sup>16</sup>

Issued: October 29, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

---

<sup>15</sup> *T.M.*, Docket No. 18-0149 (issued September 5, 2018).

<sup>16</sup> Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.