United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 19-1319**
	)	**Issued: December 10, 2019**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Savannah, GA, Employer	)	

Appearances:
Wayne Johnson, 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
JANICE B. ASKIN, Judge

JURISDICTION

On May 26, 2019 appellant, through counsel, filed a timely appeal from a November 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] A claimant has 180 days from the date of OWCP's decision to timely file an appeal. 20 C.F.R. § 501.3(e). One hundred and eighty days from the November 26, 2018 decision expired on Saturday, May 25, 2019. If the last day to file an appeal falls on a Saturday, Sunday, or federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(2). The appeal in this case, received by the Board on Sunday, May 26, 2019, was therefore timely filed.

Federal Employees' Compensation Act[3] (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 OWCP abused its discretion by denying appellant's request for authorization for a left total knee arthroplasty (TKA).

FACTUAL HISTORY

On June 4, 2015 appellant, then a 55-year-old lead transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his back and knees while in the performance of duty. OWCP accepted the claim for a tear of the medial meniscus of the left knee. Appellant returned to light-duty work on June 6, 2015, but stopped work on August 19, 2015 and did not return. OWCP paid him wage-loss compensation for total disability on the supplemental rolls beginning August 19, 2015 and on the periodic rolls beginning August 23, 2015.

A June 16, 2016 magnetic resonance imaging (MRI) scan of the left knee showed mucoid degeneration of the body and posterior horn of the medial meniscus and a radial tear.

On August 19, 2015 Dr. James F. Holtzclaw, a Board-certified orthopedic surgeon, performed a left knee partial medial meniscectomy. On October 14, 2015 he performed a second partial medial meniscectomy of the left knee.

In a report dated February 18, 2016, Dr. J. Kevin Brooks, a Board-certified orthopedic surgeon, reviewed appellant's history of a June 4, 2015 injury to his knee at work that had been treated with two knee surgeries. On examination of the left knee, he found tenderness to palpation over the medial and peripatellar area with no laxity. Dr. Brooks diagnosed traumatic arthropathy of the left lower leg, left knee pain, a left knee medial meniscus tear, left knee chondromalacia, and left knee primary localized osteoarthritis. He advised that appellant had failed conservative treatment and recommended a left TKA.

On February 29, 2016 Dr. Brooks requested that OWCP authorize a left TKA.

In a report dated March 11, 2016, Dr. William Tontz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed the request for surgical authorization and found that the proposed TKA was causally related to the accepted employment injury. He opined, however, that the proposed surgery was not medically necessary. Dr. Tontz asserted that appellant had failed to meet the criteria set forth in the Official Disability Guidelines for a TKA as he did not have increased pain with activity or weight bearing, severe knee arthritis, or range of motion (ROM) of less than 90 degrees.

[3] 5 U.S.C. § 8101 *et seq.*

On May 2, 2016 OWCP provided Dr. Brooks with the March 11, 2016 report from Dr. Tontz for his review. It requested that he address whether he agreed or disagreed with the DMA's findings and, if he disagreed, to provide rationale explaining the need for the surgery.

Subsequently OWCP received progress reports dated April 21, and May 19, 2016 from Dr. Brooks.

On July 27, 2016 Dr. Tontz reviewed the additional evidence and found that the proposed surgery was causally related to the accepted employment injury, but not medically necessary as appellant had no increased pain with activity or weight bearing, severe knee arthritis, or ROM under 90 degrees.

In a report dated August 1, 2016, Dr. Brooks questioned OWCP's failure to authorize the left TKA. He noted that appellant had chondral delamination "adjacent to his original tear as a result of his original injury."

On August 19, 2016 OWCP referred appellant to Dr. Henry Clark Deriso, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated September 7, 2016, Dr. Deriso diagnosed a torn left medial meniscus after surgery and osteochondrosis of the left medial femoral condyle. On examination he found pain with weight bearing over the anterior medial joint line, parapatella pain, intact ligaments, no swelling, and full ROM with pain. Dr. Deriso noted that appellant had received the customary treatment for his medial meniscus tear, but also had osteochondrosis and chondromalacia patellae. He related, "I do not think the criteria are severe enough to perform a TKA, but again if all else fails I would enter very carefully into doing a hemiarthroplasty even in light of the fact that he has some chondromalacia of his patella."[4]

Dr. Deriso referred appellant for x-rays of his bilateral knees, which were obtained on September 28, 2016 and demonstrated bilateral mild osteoarthritic changes and medial joint space narrowing.[5]

In a report dated January 6, 2017, Dr. Brooks reviewed Dr. Deriso's report and disagreed with his recommendation for a partial knee replacement in view of the amount of patella cartilage loss.

A January 10, 2017 MRI scan of appellant's left knee revealed a degenerative tear of the mid-body and posterior horn of the medial meniscus, thinning of the meniscus, moderate cartilage thinning with medial joint space osteophytes, and "severe lateral patellar facet chondromalacia with degenerative subchondral cysts and mild edema."

[4] In a report dated September 26, 2018, Dr. Deriso found that standing x-rays from 2016 showed no more than a millimeter in joint space difference between the left and his "normal right knee."

[5] In a supplemental report dated October 24, 2016, Dr. Deriso opined that appellant had not reached maximum medical improvement and clarified his work restrictions.

OWCP determined that a conflict in medical opinion existed between Dr. Brooks, appellant's attending physician, and Dr. Deriso, OWCP's referral physician, regarding the need for a left TKA. It referred him to Dr. Joseph P. Tobin, a Board-certified orthopedic surgeon, for an impartial medical examination.[6]

In a report dated June 26, 2017, Dr. Tobin discussed appellant's history of a June 4, 2015 employment injury treated with two left knee surgeries. He noted that he had continued complaints of pain. Dr. Tobin reviewed the medical evidence, including the results of diagnostic testing. On examination he found apprehension and crepitance of the patellofemoral joint, left knee effusion, and good stability and strength. Dr. Tobin diagnosed early left knee degenerative joint disease. He noted that appellant's symptoms after his medial meniscus tear had not resolved. Dr. Tobin related:

> "[Appellant] now has diagnostic evidence on MRI [scan] of osteophytes and cartilage loss in his left knee. It is my opinion to a reasonable degree of medical certainty that having his knee injured with a medial meniscus tear while pull[ing] down rollers when a bag caught his belt loop did not result in him developing degenerative arthritis of his left knee. [Appellant] has evidence of degenerative arthritis in all three compartments of his left knee, including the patellofemoral joint, the medial compartment and the lateral compartment, on his MRI [scan] with osteophytes."

Dr. Tobin further asserted that appellant's mucoid medial meniscus degeneration "may have been caused by such an injury, but did not result in degenerative joint changes of his left knee. Degenerative joint disease and osteophytes are multifactorial and occur over the course of many years and have many different causes. It is my opinion that his injury sustained on June 4, 2015 did not cause the degenerative changes of his left knee."

Dr. Tobin concurred with Dr. Brooks' opinion that appellant had failed conservative treatment, but disagreed that he required TKA in the near future. He also disagreed with Dr. Deriso's recommendation for a unicompartment arthroplasty due to his age, weight, and tricompartmental disease. Dr. Tobin related, "I do believe that [appellant]may become a candidate for a [TKA] in the future, and, in fact, [he] may be a candidate for a [TKA] at this point in time given his symptoms and indications of early tricompartment degenerative joint disease." He opined, however, that the need for the possible TKA was not causally related to the June 4, 2015 employment injury.

By decision dated March 19, 2018, OWCP denied appellant's request for authorization for a left TKA.

On April 17, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

[6] OWCP initially referred him to Dr. Douglas Hein, a Board-certified orthopedic surgeon, for an impartial medical examination, but cancelled the examination as Dr. Hein was retiring.

A telephonic hearing was held on September 11, 2018. Appellant related that Dr. Brooks had reviewed an MRI scan and recommended a knee replacement. He described his knee pain and noted that his kneecap periodically displaced. Counsel asserted that the second opinion physician had attributed appellant's arthritis to his employment injury. He questioned whether OWCP had provided Dr. Tobin with the appropriate causation standards and maintained that his opinion was equivocal regarding the need for a TKA.

In a report dated October 10, 2018, Dr. Brooks discussed appellant's history of a left knee injury, his recommendation for a TKA based on his worsening arthritis, and the reports of Dr. Deriso and Dr. Tobin. He disagreed with Dr. Tobin's opinion that his arthritis was unrelated to his employment injury, finding that the injury had aggravated possible preexisting arthritis and that the resulting surgeries had accelerated his condition. Dr. Brooks opined that appellant's age supported that the employment injury had hastened his arthritis. He asserted that appellant's chondromalacia, or cartilage loss and arthritis, had worsened in the area of his meniscal resection. Dr. Brooks related, "This is a complication that can occur with meniscal repair. In addition, he has a residual meniscus tear despite the [two] prior surgeries. Another meniscal repair will only accelerate his arthritis even further…." Dr. Brooks opined that Dr. Tobin had failed to address whether the accident and knee surgeries accelerated appellant's arthritis and consequential need for a TKA.

By decision dated November 26, 2018, OWCP's hearing representative affirmed the March 19, 2018 decision. He found that Dr. Tobin's opinion represented the special weight of the evidence and established that the need for the proposed surgery was unrelated to the accepted employment injury.

LEGAL PRECEDENT

Section 8103(a) of FECA[7] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening in the amount of monthly compensation.[8]

While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[9]

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.[10] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

[7] *Supra* note 3.

[8] 5 U.S.C. § 8103; *see N.G.*, Docket No. 18-1340 (issued March 6, 2019).

[9] *J.R.*, Docket No. 18-0603 (issued November 13, 2018).

[10] *See C.L.*, Docket No. 17-0230 (issued April 24, 2018); *D.K.*, 59 ECAB 141 (2007).

probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[11] To be entitled to reimbursement of medical expenses, a claimant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship, in a case such as this, must include supporting rationalized medical evidence.[12]

In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[13]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[14] For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.[15] Where OWCP has referred the case to an impartial medical examiner (IME) to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[16]

ANALYSIS

The Board finds that OWCP did not abuse its discretion by denying appellant's request for authorization for a left TKA.

OWCP properly found a conflict in medical opinion arose between Dr. Brooks, appellant's attending physician, and Dr. Deriso, an OWCP referral physician, regarding whether the proposed TKA should be authorized. Consequently, it referred appellant to Dr. Tobin to resolve the conflict in medical opinion pursuant to 5 U.S.C. § 8123(a).

The Board finds that the special weight of the medical evidence rests with the opinion of Dr. Tobin, who examined appellant, reviewed the medical evidence, and found that the need for the proposed TKA was not causally related to the accepted employment injury.[17]

In a report dated June 26, 2017, Dr. Tobin provided a history of injury and findings on examination. He diagnosed early degenerative joint disease of the left knee. Dr. Tobin found good stability and strength of the left knee with crepitance of the patellofemoral joint and effusion.

[11] *J.L.*, Docket No. 18-0503 (issued October 16, 2018).

[12] *K.W.*, Docket No. 18-1523 (issued May 22, 2019).

[13] *Id*.

[14] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *K.C.*, Docket No. 18-0378 (issued June 18, 2019).

[15] *Id*.

[16] *J.H.*, Docket No. 19-0513 (issued September 24, 2019).

[17] *C.L.*, Docket No. 17-0230 (issued April 24, 2018).

He opined that appellant had degenerative arthritis of the left knee in all three compartments. Dr. Tobin found that he might require a TKA in the future or at the present time due to his early degenerative joint disease, but determined that his left knee degenerative changes of the joints were not causally related to his June 4, 2015 employment injury.

In situations where the case is referred to an IME for the purpose of resolving a medical conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18] The Board finds that Dr. Tobin's opinion represents the special weight of the evidence and that OWCP properly relied on his report in denying authorization for the requested surgery. The Board finds that he had full knowledge of the relevant facts and evaluated the course of appellant's condition and his opinion is based on proper factual and medical history.[19] Dr. Tobin accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about the proposed TKA which comported with his findings.[20] He explained that the cause of appellant's degenerative arthritis was multifactorial and unrelated to the employment injury, noting that he had degenerative arthritis in all three knee compartments.

On October 10, 2018 Dr. Brooks disagreed with Dr. Tobin that appellant's arthritis was unrelated to his employment injury. He opined that the June 4, 2015 employment injury and resulting surgeries had aggravated possible preexisting arthritis and noted that his chondromalacia had worsened in the area of his meniscal resection. However, reports from a physician who was on one side of a medical conflict that an impartial medical examiner has resolved are generally insufficient to overcome the special weight of the impartial medical examiner, or to create a new conflict.[21] While Dr. Brooks asserted that appellant's arthritis resulted from his employment injury, he failed to provide a reasoned explanation for his opinion and thus it is of limited probative value.[22]

On appeal counsel asserts that OWCP erred in denying his request for a TKA based on the recommendation of appellant's attending physician. As discussed, however, OWCP properly determined that a conflict in medical opinion existed between his attending physician and OWCP's referral physician, and thus referred him to Dr. Brooks for an impartial medical examination. Dr. Brooks' opinion constitutes the special weight of the evidence and establishes that the requested surgery was not warranted for the accepted conditions.[23]

For the above-noted reasons, the Board finds that OWCP's denial of appellant's request for authorization of a left TKA was reasonable and did not constitute an abuse of discretion.

[18] *C.W.*, Docket No. 17-0918 (issued January 5, 2018).

[19] *J.T.*, Docket No. 18-0503 (issued October 16, 2018).

[20] *J.L.*, *supra* note 11.

[21] *J.T.*, *supra* note 19

[22] *J.L.*, *supra* note 11.

[23] *Id*.

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 OWCP did not abuse its discretion by denying appellant's request for authorization for a left TKA.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board