

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

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C.W., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
FEDERAL AIR MARSHAL SERVICE, )  
Orlando, FL, Employer )

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**Docket No. 18-1536  
Issued: June 24, 2019**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*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 August 8, 2018 appellant, through counsel, filed a timely appeal from a July 12, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<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.*

<sup>3</sup> The Board notes that, following the July 12, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish degenerative disc disease of the lumbar spine and osteoarthritis of the right knee consequential to the accepted June 25, 2012 employment incident.

## **FACTUAL HISTORY**

On June 25, 2012 appellant, then a 47-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury that day as a result of kneeling down to shoot at a firing range while in the performance of duty. He explained that as he was kneeling down to shoot, his left knee hit the pavement and he felt it “pop.” Afterward appellant felt sore. On the reverse side of the claim form, appellant’s supervisor indicated that appellant was injured in the performance of duty and that he did not stop work.

In an August 23, 2012 letter, OWCP indicated that when appellant’s claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay (COP) or challenge the case, payment of a limited amount of medical expenses was administratively approved. It explained that it had reopened the claim for formal adjudication of the merits because appellant had not returned to full-duty work. OWCP accepted the claim for acute left knee contusion. It later expanded the acceptance of the claim to include aggravation of degenerative arthritis, medial compartment, left knee, and small bowel obstruction. OWCP authorized a left primary total knee arthroplasty, which occurred on March 27, 2013, and a laparoscopic lysis of intestinal adhesion and intermediate wound closure of the small bowel, which occurred on April 3, 2013. Appellant was placed on the periodic compensation rolls, effective April 7, 2013.

OWCP subsequently referred appellant to a number of second opinion evaluations to determine the nature and extent of his employment-related conditions.

In a second opinion report dated July 11, 2017, Dr. Jeffrey T. O’Brien, a Board-certified orthopedic surgeon, noted that appellant complained of pain in his back and his right knee, but opined that his degenerative disc disease in his low back and osteoarthritis in his right knee were not related to the accepted employment incident. He found that appellant demonstrated degenerative disc disease in his low back based on a magnetic resonance imaging (MRI) scan report included in the record. Dr. O’Brien also found that a physical examination and diagnostics studies revealed osteoarthritis in appellant’s right knee. He, however, opined that both of these conditions were not related to the June 25, 2012 work injury. Dr. O’Brien opined that appellant’s accepted left knee conditions had resolved, but he was unable to return to full-duty work because he was unable to squat, kneel, run, or push. He advised that appellant required further treatment of his back and right knee, specifically that a replacement was likely necessary, but reiterated that these conditions were not causally related to his accepted employment injury.

On November 6, 2017 appellant submitted statements dated October 23 and November 6, 2017 claiming that he sustained a consequential back injury during his physical therapy in June 2013 and a consequential right knee injury due to the need to place most of his weight on his right knee joint due to the pain of his left knee joint and in an attempt to protect his left knee.

In support of his claim, appellant submitted physical therapy notes dated November 10, 14, 16, 22, 27, and 30, 2017.

Appellant also submitted reports dated October 9 and November 30, 2017 from Dr. Mark A. Seldes, a Board-certified family practitioner, who diagnosed degenerative disc disease of the lumbar spine, bilateral radiculopathy of the lower extremities, status postoperative left total knee replacement, internal derangement of the right knee joint, degenerative arthritis of the right knee joint, and degenerative medial meniscus of the right knee joint. Dr. Seldes opined that appellant's right knee condition was "a consequential injury to his left knee joint."

In development letters dated December 4, 2017, OWCP advised appellant that it had received his request for consequential injuries to his lumbar spine and right knee in connection with the accepted June 25, 2012 employment injury. It advised him of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries. OWCP noted that appellant's physician should specifically address how these conditions were causally related to his work-related injury.

In response, appellant submitted a December 11, 2017 x-ray of the right knee which demonstrated osteoarthritis.

Appellant further submitted a December 11, 2017 report from Dr. Seldes who diagnosed partial thickness tear of the proximal anterior cruciate ligament (ACL) of the right knee joint, right knee joint effusion, and chondromalacia of the medial tibiofemoral joint of the right knee joint. Dr. Seldes reported that appellant had "a preexisting injury to his right knee joint from a motor vehicle accident in 1994." He indicated that appellant had recovered well from that accident without the need for treatment, surgery, or physical therapy. Dr. Seldes opined that after appellant's June 25, 2012 work injury, he attempted to work as much as he could on the injured left knee while relying on his right knee for significant support for approximately one year. During that time, he indicated that appellant's right knee bore the brunt of a lot of the weight due to the ongoing pain from the left knee joint. Appellant's right knee joint would then have to bear the brunt of most of the weight and transfer weight when going from sitting to standing, when climbing up and down stairs, attempting to run or perform any physical training at work, as well as climbing in and out of his vehicle and twisting for which he would use his right knee which would cause pressure on his meniscus. Dr. Seldes concluded that given appellant's preexisting injury from a 1994 motor vehicle accident, which had appeared to have healed, appellant suffered an aggravation of the preexisting injury to his right knee. He also noted that during this same time appellant's weight had significantly increased due to a more sedentary lifestyle and a lack of exercise. Dr. Seldes noted that appellant became morbidly obese which further aggravated the stress on both his left and right knee joints, to the point where he had to have a left total knee replacement on March 27, 2013, less than one year after the June 25, 2012 injury. He related that, while undergoing physical therapy for his left knee joint, appellant's right knee joint began to cause him more significant pain. Dr. Seldes opined that this was understandable because after his left knee surgery, appellant had to solely use his right knee joint for "any significant balance." He found that review of the right knee MRI scan on January 10, 2014, the impression said degenerative extrusion of the medial meniscus without clear evidence for meniscal tear and degenerative articular cartilage loss without osteochondral injury with intact cruciate ligaments at that time. Dr. Seldes related that appellant continued to have knee joint effusion on the right side due to his overreliance and need to use the right knee joint due to the pain and continued weakness on the left side. He further indicated that a newer MRI scan dated December 11, 2017 continued to show

arthrosis with marginal spurring and tibial spiking and low grade chondromalacia at the medial tibiofemoral joint. He opined that there appeared to be an injury to the medial meniscus and the posterior horn as well as a newer injury of a partial thickness tear of the proximal ACL. Dr. Seldes concluded that appellant's right knee osteoarthritis was a consequential injury to his accepted left knee conditions.

By decision dated December 28, 2017, OWCP denied appellant's claim for consequential injuries, finding that the medical evidence of record failed to establish a causal relationship between appellant's diagnosed degenerative disc disease of the lumbar spine and osteoarthritis of the right knee and the accepted June 25, 2012 employment incident. It found that Dr. O'Brien's July 11, 2017 second opinion report represented the weight of the medical evidence.

On January 4, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted physical therapy reports dated January 4 through June 1, 2018.

In reports dated January 16 and April 17, 2018, Dr. Seldes reiterated his medical diagnoses and opinions. He reviewed Dr. O'Brien's July 11, 2017 second opinion report and opined that Dr. O'Brien provided "no medical explanation regarding his opinion" as to why appellant's lumbar spine and right knee conditions were not causally related to the accepted employment injury.

A telephonic hearing was held before an OWCP hearing representative on May 30, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted physical therapy reports dated June 4 through July 6, 2018.

Appellant also submitted a July 11, 2013 report from Dr. Alessandro L. Acosta-Fajardo, a family practitioner, who diagnosed backache and thoracic or lumbosacral neuritis or radiculitis. Dr. Acosta-Farjardo also noted that appellant "seem[ed] to have lumbar radiculopathy."

In a June 6, 2018 report, Dr. Seldes continued to opine that appellant's right knee condition was a consequential injury from the original injury to his left knee due to the transfer of weight.

By decision dated July 12, 2018, OWCP's hearing representative affirmed the December 28, 2017 decision, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's consequential injuries and the accepted June 25, 2012 employment injury.

#### **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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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, explaining causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty supported by sound medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.<sup>7</sup>

Section 8123(a) of FECA provides, in pertinent part: "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."<sup>8</sup> 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.<sup>9</sup>

Where a 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 on a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

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

The record reflects an unresolved conflict of the medical opinion evidence between Dr. O'Brien, the second opinion examiner, and Dr. Seldes, appellant's treating physician, regarding whether appellant's diagnosed degenerative disc disease and osteoarthritis in his right knee were consequential to the accepted June 25, 2012 employment injury.

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

<sup>5</sup> *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998).

<sup>6</sup> *R.V.*, Docket No. 18-0552 (issued November 5, 2018); *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

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

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>10</sup> *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

In a report dated July 11, 2017, OWCP's second opinion examiner, Dr. O'Brien, found that appellant presented with pain in his back and his right knee, but opined that appellant's diagnosed degenerative disc disease in his low back and osteoarthritis in his right knee were not causally related to the accepted work-related injury. Dr. O'Brien found that appellant's accepted left knee conditions had resolved, but he was unable to return to full-duty work because he was unable to squat, kneel, run, or push.

In a December 11, 2017 report, appellant's attending physician, Dr. Seldes, noted that after appellant's June 25, 2012 work injury, he attempted to work as much as he could on the injured left knee while relying on his right knee for significant support for approximately one year. He further explained that appellant's right knee bore the brunt of the weight due to the ongoing pain from the left knee joint and that given appellant's preexisting injury from a 1994 motor vehicle accident, which had appeared to have healed, this aggravated the preexisting injury to his right knee.

As the reports of Drs. Seldes and O'Brien are of equal weight and rationale, the Board finds that they necessitate referral to an impartial medical specialist for resolution of the conflict in medical opinion.<sup>11</sup>

For these reasons, the issue of whether appellant's degenerative disc disease of the lumbar spine and osteoarthritis of the right knee conditions are consequential to the accepted June 25, 2012 employment injury is unresolved at this time. Under section 8123(a) of FECA, OWCP must resolve this conflict by referring appellant, together with the medical record and a statement of accepted facts, to an impartial medical specialist.<sup>12</sup> After this and such other development as OWCP deems necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>11</sup> *Supra* notes 8 and 9.

<sup>12</sup> *See D.P.*, Docket No. 10-0121 (issued July 23, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 12, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: June 24, 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