United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 18-1710**
	)	**Issued: June 3, 2019**
DEPARTMENT OF THE AIR FORCE, LAKEHURST NAVAL BASE, Lakehurst, NJ, Employer	)	

Appearances:
Russell T. Uliase, 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 September 11, 2018 appellant, through counsel, filed a timely appeal from an April 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that his left hip conditions were causally related or consequential to his accepted February 23, 2015 employment injury; and (2) whether OWCP has abused its discretion by denying appellant's request for total left hip arthroplasty.

FACTUAL HISTORY

On February 24, 2015 appellant, then a 52-year-old material handler, filed a traumatic injury claim (Form CA-1) alleging that on February 23, 2015 he injured his right knee when he slipped on ice while in the performance of duty. He did not initially stop work.

On July 6, 2015 OWCP accepted the claim for chondromalacia of the right patella; fracture of the posterior medial tibial plateau, right; and right knee contusion. In the acceptance letter, it advised appellant that when his claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and a limited amount of medical expenses were administratively approved and paid. OWCP noted that it had reopened his claim because the medical bills had exceeded $1,500.00. It noted that, while treating physician Dr. Jason Wong, an osteopath Board-certified in orthopedic surgery, had indicated additional left hip diagnoses, he had not provided medical rationale explaining how the left hip conditions were caused or aggravated by the February 23, 2015 employment injury and/or how they developed as a consequence of the accepted conditions. OWCP informed appellant of the type of factual and medical evidence necessary to establish causal relationship. It afforded his 30 days to submit the necessary evidence.

In a March 6, 2015 report, Dr. Wong reviewed a right knee magnetic resonance imaging (MRI) scan and provided an impression chondromalacia of the patella, possible fracture of the posterior medial corner of the tibial plateau, which was asymptomatic. He released appellant to work without restrictions.

In a June 5, 2015 report, Dr. Wong reported that appellant had developed increased pain and discomfort to the left lower extremity as he had been favoring the right leg and had been told in the past that he had some stress fractures to the left leg. He noted that the x-rays of the left femur and the left hip demonstrated no fractures or osseous abnormalities, but were reflective of mild degenerative changes to the hip. For the left hip, Dr. Wong opined that appellant had some arthrofibrosis and possible osteoarthritis with limited range of motion. Appellant also had pain in

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the April 10, 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.*

the distal thigh, which he related might be due to a stress fracture given his history. Dr. Wong requested authorization for a bone scan of the left knee, left hip, and left pelvis.

In response, appellant reported that he suffered stress fractures in both legs and feet while in the Army in 1988. He advised that he had been favoring his right injured leg and first experienced symptoms in his left leg approximately four to six weeks after the February 23, 2015 employment injury.

An October 1, 2015 bone scan of both femurs indicated mild uptake in the left femoral neck, which might represent a stress-type injury. The previous computerized tomography (CT) scan also suggested bilateral avascular necrosis (AVN) of the hips. The radiologist recommended MRI scans of both hips.

In an October 23, 2015 report, Dr. Wong noted that appellant was status post fracture of the tibial plateau in the posterior corner of the right knee, which was resolving with physical therapy. He provided a history that appellant did not have any discomfort to the left hip until he had to start favoring his right leg due to his knee. Dr. Wong opined that appellant's left hip pain may be a stress fracture due to favoring the right lower extremity. He recommended an MRI scan of the left hip. On November 11, 2015 appellant underwent a left hip MRI scan, which was positive for left femoral head superior AVN, small left hip joint effusion, and left hip mild-to-moderate osteoarthrosis. In a November 20, 2015 report, Dr. Wong indicated that the MRI scan showed extensive AVN of the left hip. He explained that, due to the fact appellant had to be nonweight bearing from the right knee injury, the increased pressure on the left side exacerbated the pain and discomfort in his right hip or in his left hip. Dr. Wong opined that the osteoarthritis was chronic, but that the AVN of the left hip may have occurred due to the injury or increased pressure in the leg. He noted that appellant ultimately would need a total hip arthroplasty. Dr. Wong concluded that the injury to the right leg contributed to the progression and exacerbation of the left hip pain.

In a December 11, 2015 letter of medical necessity, Dr. Wong advised that appellant had a diagnosis of AVN of the left hip and the surgical procedure requested was a left total hip arthroplasty. He indicated that appellant was experiencing pain in his left hip with weight bearing and the November 5, 2015 MRI scan was significant for evidence of a superior AVN. Dr. Wong indicated that surgery was necessary as appellant had developed painful AVN of the left hip status post a fall, which he believed was exacerbated by having to apply pressure onto the left hip due to an injury to the right knee. Dr. Wong continued to report on appellant's AVN of the left hip. A repeat left hip MRI scan was performed on March 18, 2016. In a March 25, 2016 progress report, Dr. Wong indicated that the MRI scan showed AVN to the femoral head with a bit of collapse. He indicated that appellant had limited range of motion and pain with ambulation. Dr. Wong reported that appellant would like to proceed with the total hip arthroplasty.

In a June 15, 2016 report, Dr. Wong noted that he initially saw appellant on February 26, 2015 for an evaluation of his right knee following the employment injury of February 23, 2015. He summarized each of appellant's examinations, reporting appellant's assessments and diagnostic test results. Dr. Wong concluded that appellant had a final diagnosis of AVN with collapse of the femoral head and osteoarthritis of the left hip. He indicated that it was medically necessary to proceed with total hip arthroplasty due to the limitation in ambulation and left hip

pain due to the avascular changes and the osteoarthritis. Dr. Wong opined within a reasonable degree of medical probability that appellant's work injury to his right knee significantly contributed and/or solely contributed to the development and worsening of the left hip AVN. He concluded that appellant developed AVN of the left hip due to his February 23, 2015 employment injury.

On August 18, 2016 OWCP requested that its district medical adviser (DMA) review appellant's medical record and a statement of accepted facts (SOAF) to determine the medical necessity of the requested surgery and consequential injury. In an August 22, 2016 report, Dr. Arnold Berman, the DMA, reviewed the medical records and the SOAF, and opined that the closed fracture of appellant's right tibia was not competent to produce AVN and osteoarthritis of the left hip. He explained that the causation of AVN was typically metabolic and nontraumatic unless there was a specific major injury to the hip, which was not the situation in this case. The DMA noted that if major trauma had occurred it would have required a major facture and taken six to seven years for the AVN and degenerative changes to develop. He opined that it was unreasonable to conclude that the knee injury would cause AVN and there was no medical scientific basis to support such causation conclusion. The DMA noted that the x-ray and MRI scan findings indicated that appellant had longstanding preexisting degenerative changes of the left hip. He opined that the left hip replacement was required for a preexisting disease, but that it was not indicated for any injury or condition associated with the February 23, 2015 employment injury as the causation of AVN was typically associated with metabolic and other measures such as cortisone or major trauma.

OWCP referred appellant for a second opinion examination with Dr. Stanley Askin, a Board-certified orthopedic surgeon. In an October 7, 2016 report, Dr. Askin reviewed appellant's history of injury and the medical records and provided findings on examination. He noted that appellant's 2013 imaging studies revealed bilateral hip AVN predating the occurrence. Dr. Askin disagreed with Dr. Wong that the AVN developed as a consequence of the accepted work-related injury and opined that, in this case, the surgery would be addressing a preexisting condition.

OWCP found a conflict in medical opinion between Dr. Wong and Dr. Askin as to whether appellant's AVN with collapse of the left femoral head and osteoarthritis of the left hip was a consequence of the accepted employment injury and whether the total left hip arthroplasty was medically necessary and causally related to appellant's accepted conditions. It referred appellant's claim to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical evaluation and an opinion to resolve the conflict in medical opinion evidence.

In a March 10, 2017 report, Dr. Fries reviewed appellant's history, including the SOAF, and noted that appellant's accepted conditions of right knee chondromalacia patella, posteromedial tibial plateau fracture, and contusion had all healed without subjective or objective residuals. He accurately described the February 23, 2015 employment injury and provided a detailed evaluation of appellant's medical records. Dr. Fries also described appellant's orthopedic examination and discussed diagnostic testing. He provided impressions of symptomatic AVN of the left hip, asymptomatic AVN of right hip, and healed right knee injury. Dr. Fries confirmed that appellant had clear indications for a left total hip replacement to address the symptomatic idiopathic AVN. He opined that the fall had not caused necrosis, noting that the CT scan of May 12, 2013 was reported to confirm bilateral AVN well prior to his fall. Dr. Fries explained that AVN could be

seen following a major hip fracture or hip dislocation, but not due to more minor trauma. He further opined that, any aggravation of AVN was not supported by appellant's history, since the first mention of hip symptoms was more than three months after his fall. Dr. Fries concluded that appellant had a longstanding left hip avascular arthrosis and osteoarthritis and that the left hip pathology was not a consequence of the right knee injury or the injuries sustained in the fall. He indicated that the medical evidence supported the medical necessity for a left hip arthroplasty, but opined that there was no causal relationship to the accepted traumatic conditions affecting the right knee.

By decision dated August 1, 2017, OWCP denied expansion of the acceptance of appellant's claim to include additional diagnoses of AVN with collapse of the femoral head of the left hip and osteoarthritis of the left hip, finding that the evidence of record was insufficient to establish that stated conditions were causally related to the accepted February 23, 2015 employment injury. It also denied his request for authorization of total left hip arthroplasty as the evidence of record did not support that it was medically necessary to address the effects of his employment injury. OWCP accorded special weight to the opinion of Dr. Fries, the impartial medical examiner (IME).

On April 12, 2017 appellant underwent a left total hip arthroplasty performed by Dr. Wong.

On August 8, 2017 appellant, through counsel, requested a hearing before a hearing representative with OWCP's Branch of Hearings and Review. A hearing was held on January 17, 2018. No additional evidence was received.

By decision dated April 10, 2018, an OWCP hearing representative affirmed the August 1, 2017 decision, finding that the medical evidence of record was insufficient to establish that appellant's left hip AVN and subsequent surgery were causally related to or a consequence of the accepted February 23, 2015 employment injury. She determined that the special weight of medical opinion evidence rested with Dr. Fries, the IME, who determined that appellant's left hip pathology was not a consequence of the accepted right knee injury and that there were no causal relationship to the accepted traumatic conditions affecting the right knee. The hearing representative concluded that, based on the medical evidence of record, OWCP's denial of the requested total left hip arthroplasty was reasonable.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5]

[4] *Supra* note 2.

[5] *See F.H.*, Docket No. 18-1238 (issued January 18, 2019); *Tracey P. Spillane*, 54 ECAB 608 (2003).

These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[7]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.[8] 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 supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional misconduct.[10] Thus, a subsequent injury, be it 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.[11]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[12] 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.[13] When 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

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *J.C.*, Docket No. 18-1722 (issued April 15, 2019); *D.G.*, Docket No. 17-1748 (issued June 6, 2018).

[8] *G.N.*, Docket No. 18-0403 (issued September 13, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *K.V.*, Docket No. 18-0723 (issued November 9, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[10] *D.H.*, Docket No. 18-1159 (issued February 15, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, The Law of Workers' Compensation 10-1 (2006).

[11] *See Y.P.*, Docket No. 17-0859 (issued December 4, 2018). *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139 (2001).

[12] 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[13] 20 C.F.R. § 10.321.

such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that his left hip conditions were causally related to or consequential to his accepted February 23, 2015 employment injury.

In his October 23, 2015 report appellant's treating physician, Dr. Wong related that appellant did not have discomfort in his left hip until he started favoring his right leg due to his accepted right knee injury. In his June 15, 2016 report, he advised that appellant had a final diagnosis of AVN with collapse of the femoral head and osteoarthritis of the left hip. Dr. Wong opined that appellant's employment injury to his right knee significantly contributed and/or solely contributed to the development and worsening of the left hip AVN of the left hip and that appellant developed AVN of the left hip due to his February 23, 2015 employment injury. Dr. Askin, OWCP's second opinion physician, disagreed with Dr. Wong that appellant's left hip conditions developed as a consequence of the accepted employment injury.

OWCP properly determined that there was a conflict in medical opinion between Dr. Wong and Dr. Askin as to whether appellant's AVN with collapse of the left femoral head and osteoarthritis of the left hip were causally related to or consequential to his accepted employment injury. It referred appellant, along with a SOAF, a list of specific questions, and the medical record, to Dr. Fries for an impartial medical evaluation and an opinion to resolve these issues.[15]

The Board finds that the report of Dr. Fries is sufficient to carry the special weight of the medial evidence. In a March 10, 2017 report, Dr. Fries reviewed appellant's history, including the SOAF, and noted that appellant's accepted conditions of right knee chondromalacia patella, posteromedial tibial plateau fracture, and contusion had all healed without subjective or objective residuals. He described appellant's orthopedic examination and discussed diagnostic testing. Dr. Fries provided impressions of symptomatic AVN of the left hip, asymptomatic AVN of right hip, and healed right knee injury. However, he opined that the work-related fall did not cause AVN, noting that the May 12, 2013 CT scan was reported to confirm bilateral AVN well prior to the fall. Dr. Fries explained that AVN could be seen following a major hip fracture or hip dislocation, but not due to more minor trauma. He further opined that, any aggravation of AVN was not supported by appellant's history, since the first mention of hip symptoms was more than three months after his fall. Dr. Fries concluded that appellant had a longstanding left hip avascular arthrosis and osteoarthritis and that the left hip pathology was not a consequence of the right knee injury or the injuries sustained in the fall. In situations where the case is referred to an impartial medical specialist for the purpose of resolving a medical conflict, the opinion of such specialist, if

[14] *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

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

sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

On appeal, counsel asserts that Dr. Fries' report cannot carry the special weight of the evidence. He erroneously argues that Dr. Fries' failed to provide a medical opinion as to osteoarthritis. As noted, Dr. Fries had indicated that the osteoarthritis was not a consequence of the right knee injury or the other employment-related injuries. Counsel also cited two Board decisions in which OWCP decisions were remanded based on the selected specialist not reviewing relevant medical evidence pertaining to a preexisting condition and where the IME was unable to review the complete medical record. In this case, he indicated that Dr. Fries reported the AVN was preexisting based on a 2013 CT scan, which he did not have in his possession. However, the CT scan results were described and compared in the MRI scan report which Dr. Wong had submitted. The hearing representative specifically found that there was no medical evidence to refute the accuracy of those findings. Counsel additionally asserts that Dr. Fries failed to offer an opinion as to the aggravation of preexisting conditions, that his opinions were generalizations, and that he mischaracterized Dr. Wong's findings as Dr. Wong had not stated that the left hip condition was traumatic, but that his altered gait aggravated his left hip. Dr. Fries, however, explained why AVN was not seen or due to minor trauma. He also opined that, an aggravation of AVN was not supported by appellant's history, since the first mention of hip symptoms was more than three months after his fall.

The Board finds that Dr. Fries provided a well-rationalized opinion based on a complete background, his review of the accepted facts, the medical record, and his examination findings. Dr. Fries' opinion that the left hip avascular arthrosis and osteoarthritis and left hip pathology were not a consequence of the right knee injury or the injuries sustained in the fall affecting the right knee is entitled to special weight and represents the weight of the evidence.[17]

Accordingly, the Board finds that appellant has not met his burden of proof to establish expansion of the acceptance of his claim to include additional diagnoses of AVN with collapse of the femoral head of the left hip and osteoarthritis of the left hip.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA provides for the furnishing of 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.[18] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.[19] OWCP has

[16] *See W.M.*, Docket No. 17-0337 (issued August 8, 2017); *Guiseppe Aversa*, 55 ECAB 164 (2003).

[17] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[18] *Id.* at § 8103; *B.L.*, Docket No. 17-1813 (issued May 23, 2018).

[19] *I.T.*, Docket No. 17-1012 (issued July 24, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

broad administrative discretion in choosing the means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.[20]

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 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.[21]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[22] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[23] Therefore, in order to prove that the surgical procedure is warranted, appellant must submit medical evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[24]

ANALYSIS -- ISSUE 2

The Board further finds that OWCP has not abused its discretion by denying appellant's request for total left hip arthroplasty.

As previously discussed, OWCP properly determined that a conflict existed in the medical opinion evidence as to whether his left hip conditions were causally related to the accepted employment injury and necessitated total hip replacement. The Board finds that OWCP properly accorded special weight to Dr. Fries' medical opinion as an IME.[25] Dr. Fries specifically found that, while the medical evidence supported the medical necessity for a left hip arthroplasty, there was no causal relationship between the diagnosed left hip conditions and the accepted conditions affecting the right knee. As previously noted he explained that appellant had longstanding left hip avascular arthrosis and osteoarthritis, which were not causally related to the minor trauma caused by appellant's accepted employment injury.

The only limitation on OWCP's authority is approving or disapproving service under FECA is one of reasonableness.[26] In the instant case, OWCP received a letter of medical necessity from Dr. Wong for a total left arthroplasty due to AVN of the left hip. It obtained an impartial

[20] *See N.M.*, Docket No. 18-1584 (issued March 15, 2019); *Mira R. Adams*, 48 ECAB 504 (1997).

[21] *J.T.*, Docket No. 16-0731 (issued May 11, 2017); *L.W.*, 59 ECAB 471 (2008).

[22] *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *see also Debra S. King*, 44 ECAB 203, 209 (1992).

[23] *Id.*; *see also Bertha L. Arnold*, 38 ECAB 282 (1986).

[24] *See N.M., supra* note 20; *see also Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[25] *Supra* note 14.

[26] *See W.M., supra* note 16; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

medical examination through Dr. Fries who found that, while the total left hip arthroplasty was warranted, it was not causally related to the accepted right knee injury. OWCP therefore had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.[27]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his left hip conditions were causally related to or consequential to his accepted February 23, 2015 employment injury. The Board further finds that OWCP has not abused its discretion by denying his request for total left hip arthroplasty.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2019
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

[27] *Id.*