United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 19-0724**
	)	**Issued: September 5, 2019**
U.S. POSTAL SERVICE, MAIL PROCESSING ANNEX, Orlando, FL, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 18, 2019 appellant, through counsel, filed a timely appeal from a December 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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]

[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.*

[3] The Board notes that following the December 19, 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 expand the acceptance of his claim to include the additional condition of degenerative arthritis of the right knee as a consequence of the accepted November 8, 2011 employment injury.

FACTUAL HISTORY

On November 9, 2011 appellant, then a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 8, 2011 he injured his lower back, neck, legs, arms, shoulders, and wrists when he pushed a wire cage full of mail while in the performance of duty. He stopped work on November 8, 2011. OWCP initially accepted the claim for neck sprain, lumbar sprain, and left knee/leg sprain. Beginning January 23, 2012, it paid appellant wage-loss compensation on the supplemental rolls. Effective February 12, 2012, OWCP placed him on the periodic compensation rolls. In July 2012, it expanded appellant's claim to include aggravation of left knee arthritis.[4] OWCP also authorized a December 17, 2012 total left knee arthroplasty.

By decision dated June 17, 2013, OWCP terminated medical benefits with respect to appellant's accepted cervical and lumbar conditions. However, appellant remained eligible for medical benefits with respect to his left knee. He also continued to receive wage-loss compensation on the periodic rolls.

In an August 22, 2013 letter and report, Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, noted that appellant was recovering well from his total left knee replacement surgery and was unable to return to any type of work, including sedentary employment, due to instability in his left knee. He also reported that appellant had developed a "consequential injury in his right knee joint secondary to the problems he had with his left knee joint."[5] Dr. Bishai explained that appellant had been walking with a very bad left knee joint for a prolonged period and was putting most of his weight on the right leg and knee in order to avoid putting weight on the left knee. Upon examination of appellant's right knee, he reported tenderness overlying the joint line and tenderness overlying the patella. Range of motion revealed extension of approximately 180 degrees and flexion to approximately 90 degrees. Dr. Bishai reported right knee diagnoses, including degenerative arthritis of the left knee joint and status postop arthroscopic surgery of the right knee joint for meniscus tear problems.

A September 3, 2013 right knee magnetic resonance imaging (MRI) scan revealed joint effusion, degenerative cysts, tears of the lateral and medial meniscus, and diffuse osteophyte formation throughout the knee joint.

In a December 17, 2013 letter and report, Dr. Bishai continued to opine that appellant sustained a consequential right knee injury because he had to put more weight on his right lower extremity to take pressure off his accepted left knee employment injury. He reported right knee examination findings of tenderness overlying the joint line both medially and laterally and tenderness overlying the patella. Dr. Bishai explained: "For all the time [appellant] suffered from his left knee condition, his right knee was having more weight bearing than normal to compensate

[4] Appellant had previously undergone a December 2009 left knee arthroscopy to repair a torn medial meniscus.

[5] On December 4, 2008 appellant underwent right knee arthroscopy to repair a torn medial meniscus.

for the left knee condition so [appellant] developed symptoms in his right knee joint … this is a classic case of consequential injury." He requested that appellant's right knee condition be accepted as a consequential injury.

In a December 20, 2013 report, Dr. Sean M. McFadden, a Board-certified orthopedic surgeon, noted that he evaluated appellant for complaints of continued and progressive right knee pain over the prior year.[6] Examination of appellant's right knee demonstrated positive pain on palpation along the medial joint space and osteophyte formation of the medial femoral condyle and medial tibial plateau. Dr. McFadden related that a right knee x-ray revealed end-stage arthritis of the medial joint space. He recommended partial right knee replacement surgery. In reports dated September 22 and November 24, 2015, Dr. McFadden continued to evaluate appellant for his right knee symptoms and recommend surgery.

On April 1, 2014 OWCP referred appellant along with the statement of accepted facts (SOAF) and the medical record to Dr. Brian Leung, a Board-certified orthopedic surgeon for a second opinion examination, to determine the status of appellant's left knee condition and whether his right knee condition was consequential to his accepted left knee injury. In a May 9, 2014 report, Dr. Leung noted his review of the SOAF and related that appellant's claim was accepted for neck strain, lumbar strain, and aggravation of left knee osteoarthritis. He related that appellant's left knee was doing well after a total knee replacement surgery, but he now complained of severe right knee pain. Upon examination of appellant's right knee, Dr. Leung observed pain over the medial joint space and on McMurray testing. Range of motion demonstrated full extension and 120 degrees flexion. Dr. Leung indicated that diagnostic testing of appellant's right knee revealed predominantly medial compartment, patellofemoral osteoarthritis, joint space narrowing, subchondral sclerosis, and osteophyte formation. He diagnosed right knee osteoarthritis, moderately severe with joint space narrowing. Dr. Leung opined that appellant's right knee injury was degenerative and not related to his left knee injury. He reported that appellant was capable of returning to light-duty work and completed a work capacity evaluation form providing restrictions.

Dr. Bishai continued to treat appellant. In reports dated August 27 and October 1, 2014, he related appellant's complaints of left hip, back, and right knee pain. Dr. Bishai reported examination findings of tenderness overlying the right knee joint line both medially and laterally and some effusion in the joint. He opined that appellant continued to have significant problems as a result of a consequential right knee injury.

In August 2015, appellant underwent a left total hip arthroplasty.

In a September 28, 2016 letter, appellant's then-representative, requested that OWCP add appellant's right knee degenerative arthritis to his claim as a consequential injury.

In reports dated March 24, April 27, and July 19, 2016, Dr. Bishai continued to opine that appellant suffered a consequential right knee injury due to his left knee injury. He explained that while appellant was suffering from his left knee injury and receiving treatment, he was putting most of his weight on his right lower extremity, which affected his right knee and caused appellant to develop degenerative arthritis of the right knee joint. Dr. Bishai reported that this was a "case

[6] Dr. McFadden performed a December 2009 left knee arthroscopy, the December 2012 left total knee arthroplasty, as well as a December 4, 2008 right knee arthroscopy.

of consequential injury from overuse of the right lower extremity and right knee joint." He continued to provide right knee examination findings and diagnosed status post-arthroscopic surgery of the right knee joint.

In an October 5, 2016 report, Dr. McFadden related appellant's complaints of severe right knee pain limiting his normal daily activities. He noted examination findings and diagnosed right knee end-stage arthritis and status post left total knee arthroplasty. Dr. McFadden opined that appellant had a consequential injury to the right knee that occurred as a result of his left knee injury. He recommended right total knee replacement surgery.

On April 26, 2017 OWCP determined that a conflict in medical opinion existed between Dr. McFadden, appellant's treating physician, and Dr. Leung, OWCP's referral physician, regarding whether appellant sustained a consequential right knee injury causally related to his accepted left knee injury. It referred him to Dr. Robert Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 26, 2017 report, Dr. Elkins reviewed the SOAF and appellant's medical records. He noted the November 8, 2011 employment injury and that appellant's claim was accepted for left knee, neck, and lumbar sprain, and aggravation of left knee osteoarthritis. Dr. Elkins noted that no significant references had been made to appellant's right knee problems other than his right knee surgery in 2008. He reported right knee examination findings of tenderness over the medial joint line and negative drawer. McMurray's, Lachman's, and Homan's signs were negative. Range of motion testing revealed flexion of 4 to 98 degrees and slight crepitus at 45 degrees. Dr. Elkins diagnosed status post left hip replacement, not related, status post left total knee replacement with good result, right degenerative arthritic changes and loss of range of motion, and neck and back chronic problems.

In response to OWCP's questions, Dr. Elkins noted that appellant had degenerative arthritis in the right knee. He opined that appellant's right knee end-stage arthritis was not a consequential injury. Dr. Elkins explained that appellant underwent right knee surgery in 2008 for moderately advanced arthritis and other conditions, which supported a preexisting problem. He also related that appellant's history showed that he had not complained of much right knee pain until after his total knee replacement surgery. Dr. Elkins noted that a 2013 right knee MRI scan showed a continuation of the 2008 problem. He concluded that appellant had an "independent osteoarthritis of the right knee" which occurred before the current injury.

In a September 27, 2017 report, Dr. Mark A. Seldes, a Board-certified family practitioner, related that he evaluated appellant for complaints of moderate-to-severe right knee pain. He reported that the right knee was a consequential injury from the original November 8, 2011 employment injury. Dr. Seldes explained that appellant "overloaded his right lower extremity and the right knee essentially took the brunt of all the work and stress needed to allow him to stand and walk." Upon examination of appellant's right knee, he observed moderate tenderness overlying the joint line both medially and laterally and moderate swelling over the joint due to moderate effusion medially. Range of motion testing showed flexion to 95 degrees with pain and moderate crepitus and popping over the patellar area while performing flexion and extension maneuvers. Dr. Seldes noted various diagnosed conditions, including status post arthroscopic surgery of the right knee joint for meniscal tear and degenerative arthritis of the right knee as a consequential injury to the left knee condition.

By decision dated October 20, 2017, OWCP denied expansion of appellant's claim to include a consequential right knee injury. It found that the special weight of the medical evidence rested with Dr. Elkins' July 26, 2017 impartial medical report, which determined that appellant's right knee condition was not a consequential injury.

On February 6, 2018 appellant, through his then representative, requested reconsideration of the October 20, 2017 decision.

OWCP subsequently received several reports from Dr. Seldes dated October 25, 2017 to April 12, 2018. Dr. Seldes provided examination findings similar to his previous report and opined that appellant's right knee condition was a consequential injury to the left knee. He reported that appellant had to "overload his right lower extremity" during his recovery and rehabilitation for his accepted left knee injury. Dr. Seldes related that before appellant had left total knee replacement on December 17, 2012 he had to ambulate for two years using his dominant knee on the right side, and that after the surgery appellant continued to use his right knee to ambulate. He further explained that appellant had a consequential right knee injury "due to bearing the weight and the stress of the right knee secondary to his left knee injury." Dr. Seldes continued to request that appellant's claim be updated to include degenerative arthritis of the right knee.

Appellant submitted an October 24, 2017 report by Dr. McFadden in which he requested that OWCP approve appellant's claim for a consequential right knee injury so that appellant could proceed with surgery. Dr. McFadden indicated that he had documented over the past two years the progression of right knee arthritis and the fact that the condition was work related. He noted that appellant had progression of the arthritis as noted on x-rays, loss of function, and progression of pain.

OWCP also received additional diagnostic testing. A January 24, 2018 right knee x-ray showed osteoarthritis worse in the medial and patellofemoral compartments with small joint effusion. A right knee MRI scan revealed osteoarthritis with full-thickness cartilage loss in the medial compartment and moderate cartilage loss in the patellofemoral compartment and mild cartilage loss in the lateral compartment, associated joint effusion and mild synovitis, and complex multidirectional tear of the posterior horn and body of the medial meniscus.

By decision dated May 16, 2018, OWCP denied modification of the October 20, 2017 decision.

On July 30, 2018 appellant, through his representative, requested reconsideration.

OWCP received medical reports from Dr. Seldes dated May 10 to December 12, 2018. Dr. Seldes continued to request that appellant's right knee osteoarthritis be accepted as a consequential injury so that appellant could undergo total right knee replacement surgery. He reiterated that, while appellant received treatment for his work-related left knee injury, the right knee "took the brunt of the weight bearing for the body" as appellant was unable to use his left knee during rehabilitation. Dr. Seldes reported right knee examination findings of moderate tenderness to palpation over the medial and lateral joint line and moderate swelling in the joint line due to effusion. He noted diagnoses related to appellant's right knee of status post-arthroscopic surgery of the right knee joint for meniscal tear and severe right knee degenerative arthritis.

By decision dated December 19, 2018, OWCP denied modification of the May 16, 2018 decision.

LEGAL PRECEDENT

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 question that requires rationalized medical opinion evidence to resolve the issue.[8] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[9] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[10]

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 a claimant's own intentional misconduct.[11] 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.[12]

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.[13] 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.[14] Where OWCP has referred the case to an impartial medical examiner to resolve the 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.[15]

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[7] *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[8] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[9] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[10] *Id.*

[11] *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation* 10-1 (2006).

[12] *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

[13] 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).

[14] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[15] *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *Gary R. Sieber*, 57 ECAB 414, 416 (2006).

ANALYSIS

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include the additional condition of degenerative arthritis of the right knee as a consequence of the accepted November 8, 2011 employment injury.

The Board finds that OWCP properly determined that a conflict in medical opinion existed between Dr. McFadden, appellant's treating physician, and Dr. Leung, the second opinion examiner, on the issue of whether appellant sustained a consequential right knee injury due to his accepted November 8, 2011 employment injury. Accordingly, OWCP referred appellant to Dr. Elkins for an impartial medical examination and an opinion to resolve the conflict.[16]

In a July 26, 2017 report, Dr. Elkins reviewed the medical record, the SOAF, and noted the November 8, 2011 employment injury along with appellant's accepted conditions of left knee, neck, and lumbar sprain, and left knee osteoarthritis. He reported right knee examination findings of tenderness over the medial joint line and negative drawer. Dr. Elkins diagnosed status post left hip replacement, not related, status post left total knee replacement with good result, right degenerative arthritic changes and loss of range of motion, and neck and back chronic problems. He reported that appellant's right knee condition was degenerative in nature and that there was no evidence to establish that appellant's employment caused or contributed to his degenerative right knee condition. Dr. Elkins opined that appellant's right knee end-stage arthritis was not a consequential injury.

The Board finds that the report of Dr. Elkins is sufficient to carry the special weight of medical opinion evidence and establishes that appellant did not sustain a consequential right knee injury due to the accepted November 8, 2011 employment injury.[17] Dr. Elkins accurately described the employment injury and noted his review of the medical record, including the SOAF. He performed a thorough, clinical examination and provided findings on examination. Dr. Elkins opined that appellant's right knee condition was degenerative in nature and was present before the employment injury. He explained that appellant had a preexisting right knee problem and had a history of right knee symptoms. Dr. Elkins concluded that there was no evidence to establish that appellant's right knee osteoarthritis was consequential to the accepted November 8, 2011 left knee injury. Where OWCP has referred the case to an impartial medical examiner to resolve the 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.[18] Accordingly, the Board finds that OWCP properly accorded the special weight of medical evidence to Dr. Elkins as the impartial medical examiner.

The medical evidence submitted subsequent to Dr. Elkins' impartial medical report is insufficient to overcome the special weight. In reports dated September 27, 2017 to December 12, 2018, Dr. Seldes noted his disagreement with Dr. Elkins' July 26, 2017 opinion and explained that appellant had a consequential injury due to bearing the weight and stress on his right knee. The Board finds that Dr. Seldes' reports are insufficient to establish expansion of appellant's claim as

[16] *Supra* notes 12 and 13.

[17] *See G.M.*, Docket No. 18-1710 (issued June 3, 2019); *M.M.*, Docket No. 16-1655 (issued April 4, 2018).

[18] *Supra* note 14.

they do not contain sufficient explanation, based on medical rationale, of how appellant's right knee osteoarthritis resulted from his accepted left knee condition and/or authorized surgery.[19] Dr. Seldes did not provide a pathophysiological explanation as to how excessive weight bearing on appellant's right knee caused or contributed to his right knee arthritis.[20] The need for rationalized medical evidence is particularly important in light of appellant's preexisting right knee meniscal tear and arthroscopy.[21] The Board finds, therefore, that Dr. Seldes' reports are insufficient to meet appellant's burden of proof or to create a new conflict.

OWCP also received an October 24, 2017 report by Dr. McFadden. This report is also insufficient to overcome the special weight afforded to Dr. Elkins, as the impartial medical examiner, because reports from a physician who was on one side of a medical conflict that an impartial specialist resolved are, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[22]

As the medical evidence of record is insufficient to establish consequential right knee osteoarthritis causally related to his accepted left knee injury, the Board finds that appellant has not met his burden of proof.[23]

On appeal counsel argues that OWCP's decision ignores dual and proximate causation. As explained above, Dr. Elkins provided a well-rationalized opinion based on a complete factual background, SOAF, review of the medical record, and physical examination findings that appellant's right knee osteoarthritis was not causally related to his accepted left knee employment injury. Accordingly, Dr. Elkins' medical opinion was sufficient to carry the special weight of medical evidence and he resolved the conflict.

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 me his burden of proof to expand the acceptance of his claim to include the additional condition of degenerative arthritis of the right knee as a consequence of the accepted November 8, 2011 employment injury.

[19] Medical evidence that states a condition, but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *D.H.*, Docket No. 17-1913 (issued December 13, 2018); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[20] *D.F.*, Docket No. 19-0067 (issued May 3, 2019); *D.W.*, Docket No. 13-1873 (issued March 13, 2014).

[21] *W.S.*, Docket No. 17-1769 (issued July 26, 2018); *S.W.*, Docket No. 08-2538 (issued May 21, 2009).

[22] *I.J.*, 59 ECAB 408, 414 (2008).

[23] *See A.T.*, Docket No. 18-1717 (issued May 10, 2019).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 2019
Washington, DC

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

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

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