United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 19-1791**
	)	**Issued: August 13, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Deptford, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 26, 2019 appellant, through counsel, filed a timely appeal from a July 22, 2019 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 July 22, 2019 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 OWCP abused its discretion by denying appellant's request for authorization for right unicompartmental knee arthroplasty.

FACTUAL HISTORY

On March 15, 2017 appellant, then a 51-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 14, 2017 he fell down, landing on his right knee and hand, when his shoelace became caught on a scale while in the performance of duty. He alleged that the fall caused a strained right knee and hand. On May 3, 2017 OWCP accepted appellant's claim for right knee contusion. On May 10, 2017 it expanded acceptance of his claim to include the additional conditions of complex tear of the right medial meniscus, and sprain of the right wrist. On May 18, 2017 appellant returned to light-duty work for two hours per day. OWCP authorized wage-loss compensation for the period May 27 through July 7, 2017 on the supplemental rolls.

OWCP subsequently received a note dated March 24, 2017 wherein Dr. Barry E. Kenneally, Board-certified in family practice and sports medicine, recounted appellant's history of injury on March 14, 2017. Dr. Kenneally described appellant's right knee x-rays of that date which demonstrated anterior and medial compartment osteoarthritis, as well as his March 22, 2017 magnetic resonance imaging (MRI) scan which demonstrated medial meniscal extrusion and contusion of the patella. Dr. Kenneally noted that appellant had a history of preexisting arthritis in appellant's right knee and underwent a steroid injection on or before March 2016 to help with pain.

On April 7, 2017 Dr. Kenneally diagnosed right knee contusion and primary osteoarthritis of the right knee. On June 21, 2017 he again examined appellant and diagnosed primary osteoarthritis of the right knee. Dr. Kenneally found that appellant had pain with patellar compression and mild joint line tenderness. On June 28, 2017 he performed a right knee injection to treat appellant's primary osteoarthritis and degenerative joint disease of the right knee. On July 5, 2017 Dr. Kenneally provided appellant's third orthovisc injection to the right knee.

On July 11, 2017 appellant accepted a modified-duty position working eight hours a day with restrictions.

In a July 19, 2017 note, Dr. Kenneally performed an additional right knee injection. On August 2, 2017 he noted that appellant's right knee pain had not improved with injections. Dr. Kenneally reviewed additional right knee x-rays and found advanced degenerative changes on the tunnel side. His physical examination revealed tenderness on the medial joint line, antalgic gait, and limited flexion. Dr. Kenneally diagnosed pain in the right knee and severe osteoarthritis of the right knee. He recommended consideration of total knee replacement surgery.

On August 19, 2017 OWCP's district medical adviser (DMA) Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, reviewed the medical evidence of record and opined that appellant was in need of a total knee replacement, but that the surgery was not causally related to the March 14, 2017 employment injury. He found that, based on a March 2017 x-ray and a October 15, 2013 MRI scan, appellant already had advanced osteoarthritis which indicated that it was inevitable that he would require a right total knee replacement based on his prior disease and

not the new injury. The DMA found no evidence that the March 14, 2017 work injury accelerated or aggravated the preexisting condition of osteoarthritis based on his review of the diagnostic studies. He noted that appellant's claim had not been accepted for right knee osteoarthritis and should not be expanded to include this condition.

On November 2, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion examination with Dr. Robert F. Draper, a Board-certified orthopedic surgeon. In his December 8, 2017 report, Dr. Draper reviewed the SOAF and noted appellant's history of injury and accepted conditions. He opined that appellant's right knee osteoarthritis was preexisting and not work related. Dr. Draper reviewed appellant's diagnostic studies and performed a physical examination noting that appellant had full extension and 100 degrees of flexion in the right knee. He reported mild crepitus, but no instability. Dr. Draper found effusion and mild diffuse tenderness in the right knee. He diagnosed traumatic injury to the right knee with torn right medial meniscus, and persistent effusion, chondromalacia of the right patella, and anterior cruciate ligament (ACL) ganglion transformation. Dr. Draper recommended immediate right knee arthroscopic surgery. He also found that appellant could perform light-duty work with restrictions.

In a report dated February 21, 2018 report, Dr. Jess H. Lonner, a Board-certified orthopedic surgeon, noted appellant's history of injury and reviewed appellant's right knee diagnostic studies. He noted that February 14, 2018 x-rays showed advanced medial arthritis and with complete loss of the medial joint space, subchondral sclerosis, and subchondral cyst in the medial femoral condyle, and osteophytes. Dr. Lonner found that appellant's March 22, 2017 MRI scan demonstrated advanced medial arthritis and a tear of the root of the posterior horn of the medial meniscus. On examination he found that appellant limped, had slight leg length discrepancy, and mild varus of the right knee. Dr. Lonner listed right knee range of motion as 5 to 115 degrees with medial joint line tenderness and crepitus. He diagnosed primary osteoarthritis of the right knee and complex tear of the medial meniscus of the right knee. Dr. Lonner opined that appellant sustained a tear of the root of the posterior horn of his medial meniscus in the employment injury, as well as a substantial flare of degenerative arthritis in the medial compartment. He further opined that the arthritis predated appellant's work injury, but that the work injury materially exacerbated appellant's knee symptoms. Dr. Lonner found that arthroscopic surgery as suggested by Dr. Draper would be "completely worthless" as appellant had a root tear of the medial meniscus and very severe and extensive arthritis. He recommended right medial unicompartmental knee arthroplasty.

On April 30, 2018 Dr. Lonner noted that appellant had undergone physical therapy without significant relief. He noted that appellant's work injury exacerbated his knee arthritis and tore his medial meniscus when appellant fell on March 14, 2017. Dr. Lonner opined that arthroscopic surgery would not help relieve appellant's pain and that an arthroscopic procedure to address the root tear of the medial meniscus would be ineffective. He again prescribed a right medial unicompartmental knee arthroplasty. Dr. Lonner found that appellant was an appropriate candidate for consideration of right knee replacement and was a good candidate for surgical reconstruction.

In a May 2, 2018 development letter, OWCP noted that the condition of primary osteoarthritis was not accepted as causally related to appellant's accepted March 14, 2017 employment injury and therefore, his request for authorization of reconstruction of the knee joint

did not appear to be medically necessary for and/or causally related to his accepted conditions. It advised him of the type of medical evidence needed to support his request.

On May 14, 2018 Dr. Lonner opined that appellant tore his right medial meniscus on March 14, 2017 and that this tear also exacerbated his underlying arthritis. He explained that arthroscopic treatments for meniscal root tears were notoriously poor and often exacerbated the underlying arthritic condition. Dr. Lonner recommended right medial unicompartmental knee arthroplasty. In a May 14, 2018 note, he again diagnosed primary osteoarthritis of the right knee and complex tear of the medial meniscus.

By decision dated August 14, 2018, OWCP denied appellant's request for a knee replacement surgery. It found that the medical reports of record did not support the need for knee replacement surgery as medically necessary due to the March 14, 2017 employment injury.

On January 7, 2019 Dr. Lonner found that appellant had ongoing right medial knee pain from a work injury, which caused right medial meniscus tear, and flared underlying arthritis. He found that appellant had a medial meniscal tear and medial arthritis. Dr. Lonner noted that appellant's arthritis was "flared" in a work injury and that appellant was considering medial unicompartmental knee arthroplasty. He again opined that arthroscopic surgery would not be effective for appellant.

On April 9, 2019 appellant, through counsel, requested reconsideration of the August 14, 2018 decision. Counsel contended that Dr. Lonner's report was sufficient to meet appellant's burden of proof.

In a May 13, 2019 report, Dr. Lonner found that appellant had ongoing right medial knee pain, giving way, and discomfort with prolonged walking. He continued to recommend unicompartmental knee arthroplasty.

On June 14, 2019 OWCP's DMA reviewed Dr. Lonner's reports and findings that appellant's medial meniscal root tear exacerbated his underlying arthritic condition. He again found that the March 14, 2017 employment injuries of medial meniscal tear and knee contusion had not caused, aggravated, or accelerated appellant's severe preexisting osteoarthritis.

By decision dated July 22, 2019, OWCP denied modification of the August 14, 2018 decision denying authorization for right knee surgery.

LEGAL PRECEDENT

Section 8103(a) of FECA[4] 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.[5]

[4] *Supra* note 2.

[5] 5 U.S.C. § 8103; *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[6]

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.[7] 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.[8] 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.[9]

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.[10]

ANALYSIS

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

OWCP accepted appellant's March 14, 2017 traumatic injury claim for right knee contusion, right knee strain, and a complex tear of the right medial meniscus.

Appellant's attending physician Dr. Kenneally diagnosed a contusion and pain in the right knee and severe osteoarthritis of the right knee and provided a series of injections to control knee pain which were unsuccessful. He recommended consideration of total knee replacement surgery. OWCP sent Dr. Kenneally's reports, including the recommendation for total knee replacement surgery, to Dr. Berman, serving as a DMA, who reviewed the medical evidence of record and opined that, although appellant was in need of a total knee replacement, the surgery was not causally related to the March 14, 2017 employment injury. As such, the DMA concluded that Dr. Kenneally's recommended right knee replacement surgery was not indicated for the accepted condition of complex tear of the right medial meniscus and that the claim should not be expanded to include osteoarthritis.

OWCP undertook additional development of the claim by sending appellant for a second opinion examination with Dr. Draper. In a December 8, 2017 report, Dr. Draper noted that he had

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

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

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

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

[10] *Id.*

reviewed the SOAF and noted appellant's history of injury and accepted conditions. He confirmed diagnoses related to a traumatic injury to the right knee as a torn right medial meniscus, and persistent effusion, chondromalacia of the right patella, and ACL ganglion transformation. Dr. Draper recommended immediate right knee arthroscopic surgery.

Appellant subsequently submitted reports, dated February 21 and April 30, 2018, by Dr. Lonner who noted appellant's history of injury and reviewed appellant's right knee diagnostic studies. Dr. Lonner diagnosed a complex tear of the medial meniscus of the right knee as well as osteoarthritis. He opined that appellant sustained a tear of the root of the posterior horn of appellant's medial meniscus in the employment injury, as well as a substantial flare of degenerative arthritis in the medial compartment. Dr. Lonner found that arthroscopic surgery as suggested by Dr. Draper, would not help relieve appellant's pain and an arthroscopic procedure to address the root tear of the medial meniscus would be ineffective. He recommended right medial unicompartmental knee arthroplasty.

On April 17, 2019 OWCP sent the most recent medical reports of Dr. Lonner to the DMA to provide an updated opinion on the medical necessity of right knee unicompartmental arthroplasty as proposed by Dr. Lonner. The DMA was informed of the accepted conditions in the claim. OWCP instructed that if he disagreed with the opinion of Dr. Lonner regarding the necessity of surgery or further treatment he should provide a rationalized opinion regarding the basis for all points of disagreement. In his June 4, 2019 response, the DMA first explained that Dr. Lonner had opined that the meniscus root tear had exacerbated underlying osteoarthritis. He noted that, osteoarthritis was not an accepted condition, nor should it be accepted and that because Dr. Lonner noted exacerbation of osteoarthritis in recommending surgery it would be unreasonable to authorize the requested surgery.

The Board finds that the June 4, 2019 opinion of the DMA fails to appropriately resolve the underlying issue of whether the right knee unicompartmental arthroplasty procedure proposed by Dr. Lonner is reasonable and necessary to address an accepted condition. The DMA was instructed to note the accepted conditions and opine whether the proposed surgery was medically necessary to address those conditions. Instead, his report focused on whether the proposed surgery would treat appellant's nonwork-related osteoarthritis. The osteoarthritis notwithstanding, OWCP sought an opinion as to whether the proposed surgery would be reasonable for the accepted conditions which includes a root tear of the medial meniscus. The Board therefore finds that the DMA failed to provide a rationalized opinion explaining whether the right knee unicompartmental arthroplasty proposed by Dr. Lonner is medically necessary to treat the accepted conditions.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation or treatment for a condition. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[12] Because the DMA has not specifically addressed the medical necessity of the proposed right knee unicompartmental

[11] *See L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[12] *Id.*, *see also S.A.*, Docket No. 18-1024 (issued March 12, 2020).

arthroplasty for treatment of any of appellant's accepted conditions, the case must be remanded to OWCP.

On remand OWCP shall request a supplemental report from Dr. Draper to obtain a rationalized medical opinion as to whether appellant's request for authorization of right knee unicompartmental arthroplasty is medically necessary due to the accepted employment injury. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 13, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board