United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 21-0007**
	)	**Issued: July 30, 2021**
U.S. POSTAL SERVICE, SOUTH JERSEY PROCESSING & DISTRIBUTION CENTER, Bellmawr, 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:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2020 appellant, through counsel, filed a timely appeal from a May 11, 2020 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 May 11, 2020 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 that acceptance of his claim should be expanded to include a left knee condition.

FACTUAL HISTORY

On September 30, 2014 appellant, then a 51-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained phlebitis and low back and bilateral knee conditions causally related to factors of his federal employment, including significant physical work. He related that he became aware of his condition in May 2009 and attributed it to his federal employment on September 2, 2014.

On March 21, 2016 OWCP referred appellant to Dr. Lawrence I. Barr, an osteopath, for a second opinion examination.[4]

Thereafter, OWCP received a May 7, 2009 magnetic resonance imaging (MRI) scan of appellant's left knee. The scan showed moderate-to-pronounced chondromalacia patella, a lateral patellar subluxation, degenerative thickening of the medial collateral ligament, a horizontal tear of the anterior and posterior horns of the lateral meniscus, and an oblique tear in the apex of the posterior horn of the medial meniscus. An MRI scan of the right knee of even date revealed moderate degenerative changes and chondromalacia patella and a horizontal tear of the anterior and posterior horns of the lateral meniscus, and a vertical tear of the medial meniscus.

In a report dated April 20, 2016, Dr. Barr described appellant's complaints of pain in his low back and bilateral knees. He noted that he was currently performing his usual employment. On examination of the knees Dr. Barr found parapatellar tenderness and crepitus at the lateral joint line of the right knee and patellofemoral joint of the left knee. He further found full strength bilaterally. Dr. Barr diagnosed lumbar degenerative disc disease, a lateral meniscal tear of the right knee with degenerative joint disease, and left knee pain. He advised that appellant had fallen and injured his right knee. Dr. Barr related, "With regard to the left knee, I do [not] find any relation between this and work. He has chondromalacia. There was no actual injury."

In a supplemental report dated May 3, 2016, Dr. Barr opined that appellant's right knee pain had begun on May 1, 2009 when he caught his foot exiting a tractor-trailer. In 2014, appellant's right knee buckled when he loaded a cart with mail. Dr. Barr found that he had sustained a right knee condition due to the May 1, 2009 employment incident. Regarding the left knee, he found no relationship "between the May 1, 2009 work occurrence and his left knee pain. There are no studies showing that the compensatory pain would cause arthritis or [a] torn menisci."

[4] Appellant had previously filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2006 he slipped and fell, injuring his right knee. OWCP assigned OWCP File No. xxxxxx714 and administratively closed the claim due to lack of activity. Appellant also alleged a traumatic injury to his right leg when his right knee buckled on March 21, 2014. OWCP assigned OWCP File No. xxxxxx658. It denied the claim, finding that he had not factually established the alleged incident. OWCP combined OWCP File No. xxxxxx658 into the current file number, xxxxxx514, with the latter serving as the master file.

On June 8, 2016 OWCP accepted the claim, assigned OWCP File No. xxxxxx514, for a tear of the right lateral meniscus and degenerative joint disease of the right knee.

On June 17, 2016 Dr. Steven H. Kahn, an osteopath, diagnosed a tear of the posterior horn and body of the right lateral meniscus, mild-to-moderate osteoarthritis of the knees bilaterally, right more symptomatic, central disc herniations at L1-2 and L5-S1, a disc bulge at L2-3, a right foraminal disc herniation at L3-4 and L4-5, mild-to-moderately severe bilateral S1 radiculopathy, chronic lumbar radiculitis, peripheral polyneuropathy likely due to diabetes mellitus, and lumbar spondylosis.. He related that appellant's left knee arthritis "had been aggravated by altered gait biomechanics due to the meniscal tears and the increasing pain he has been experiencing in his right knee." Dr. Kahn opined that OWCP should expand the acceptance of appellant's claim to include a left knee condition.

On July 12, 2016 Dr. Kahn performed OWCP-authorized arthroscopic surgery on appellant's right knee.

In a progress report dated July 18, 2016, Dr. Kahn evaluated appellant after his recent right knee surgery. He noted that an MRI scan of the left knee performed on March 9, 2014 had revealed arthritic changes with no meniscal tear. Dr. Kahn related that appellant had left knee symptoms similar to those that he had in his right knee before surgery. He asserted that OWCP should accept his left knee condition as it was "secondary to his occupation." Dr. Kahn provided a similar opinion on August 19, 2016. He noted that, in the future, appellant would likely need arthroscopic surgery on the left knee.

On September 22, 2016 appellant, through counsel, requested that OWCP adjudicate appellant's claim for an employment-related left knee condition, noting that his physician had recommended surgery.

By decision dated December 13, 2016, OWCP denied appellant's request to expand the acceptance of his claim to include a left knee condition.

On December 20, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 1, 2017.

By decision dated April 4, 2017, OWCP's hearing representative vacated the December 13, 2016 decision. He found that Dr. Barr had not relied on an accurate history of the accepted employment factors. The hearing representative remanded the case for OWCP to obtained clarification from Dr. Barr regarding whether appellant's accepted employment exposure caused or contributed to a left knee condition.[5]

In a supplemental report dated April 12, 2017, Dr. Barr noted that appellant had experienced bilateral knee pain beginning in 1986. He described his work duties and diagnosed left knee degenerative joint disease and probable degenerative joint disease of the right knee.

[5] The hearing representative noted that appellant had sustained a prior employment injury to his left foot on August 24, 2000, assigned OWCP File No. xxxxxx463 and accepted for a left foot and ankle sprain/strain, a left foot injury on May 25, 2009, assigned OWCP File No. xxxxxx885, and a right knee injury on April 11, 2016, assigned OWCP File No. xxxxxx714.

Dr. Barr opined that medical literature failed to "support a relationship between standing, walking, lifting, [and] moderate exercise and knee arthritis."

By decision dated July 17, 2017, OWCP denied appellant's request to expand the acceptance of his claim to include a knee condition causally related to or as a consequence of his accepted employment injury.

On July 24, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated August 31, 2017, Dr. Kahn noted that appellant had sustained an injury in 2006 at work when he fell. He opined that the duties of appellant's employment contributed to the degeneration in his knees bilaterally, and also noted that he had a right knee meniscal tear. Dr. Kahn reviewed the results of diagnostic studies and summarized the findings from his prior reports. He noted that OWCP had accepted his right knee condition as resulting from his work delivering mail for over 30 days. Dr. Kahn related that appellant did "not ambulate only on his right knee, he does ambulate on two feet, stand on two feet, ascend and descend stairs on two feet." He opined that appellant's left knee condition was due to "occupational hazards."

A hearing was held on November 16, 2017.

By decision dated January 30, 2018, OWCP's hearing representative vacated the July 17, 2017 decision. She noted that Dr. Kahn had attributed appellant's left knee degeneration both to his employment duties and possible gait biomechanics resulting from his accepted right knee meniscal tear. The hearing representative remanded the case for Dr. Barr to address whether his employment duties had contributed to or aggravated his left knee condition.

On May 10, 2018 Dr. Barr opined that medical literature failed to support that knee arthritis was caused or aggravated by standing, walking, lifting, or moderate exercise. He noted that kneeling and squatting could contribute depending on the duration of those activities, but that he did not believe that this was a factor for a mail handler.

By decision dated May 18, 2018, OWCP denied appellant's request to expand the acceptance of his claim to include a left knee condition due to his employment duties or as a consequence of his accepted right knee condition.

On May 31, 2018 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 28, 2018.

By decision dated February 12, 2019, OWCP's hearing representative set aside the May 18, 2018 decision. She found that a conflict existed between Dr. Kahn and Dr. Barr regarding whether appellant sustained a left knee condition as a consequence of the accepted right knee injury.

OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated April 23, 2019, Dr. Didizian diagnosed bilateral degenerative joint disease of the knee. He agreed with Dr. Barr's opinion that there was no proof that appellant's work duties

were of the nature to cause internal derangement or a meniscal tear. Dr. Didizian further found that the left knee condition was unrelated to the accepted right knee injury.

By decision dated May 21, 2019, OWCP denied appellant's request to expand the acceptance of his claim to include a left knee condition.

On May 30, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.[6]

A hearing was held on August 20, 2019.

By decision dated September 23, 2019, OWCP's hearing representative vacated the May 21, 2019 decision. She noted that a prior hearing representative had found a conflict in medical opinion and had instructed OWCP to refer appellant to for an impartial medical examination, but instead it had referred him for a second opinion examination. The hearing representative, thus, found that the conflict in medical opinion remained unresolved and instructed OWCP to refer him for an impartial medical examination.

On September 26, 2019 OWCP referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated November 18, 2019, Dr. Fries provided his review of the SOAF and the medical reports of record. He noted that appellant had a history of a motor vehicle accident in August 2019. On examination of the knees Dr. Fries found a negative Lachman's sign and McMurray's test bilaterally, and no crepitation. He diagnosed bilateral degenerative knee arthritis and chondrocalcinosis after a right knee arthroscopic debridement, diabetes mellitus, a left foot diabetic infection and abscess, resolved after surgery, and peripheral polyneuropathy, likely diabetic. Dr. Fries related that his evaluation was "limited by the absence of records concerning several work-related accidents before and after May 2009, and the effect of a recent right knee injury in a motor vehicle accident." He, referencing Chapter 10 of the second edition of the American Medical Association (A.M.A.), *Guides for the Evaluation of Disease and Injury Causation*,[7] regarding osteoarthritis, related that there was "insufficient evidence of occupational risk factors of jumping, lifting, standing, walking, and low and moderate levels of physical activity. There is only some evidence of combination risk factors of kneeling, squatting, and knee bending." Dr. Fries indicated that OWCP had accepted right knee degenerative arthritis and a torn medial meniscus, but noted that torn menisci were "common findings in knees with degenerative arthritis."[8] He opined that appellant's left knee condition was not a consequence of the accepted right knee employment injury. Dr. Fries related, "There is no scientific basis to the claim a left knee condition causes a right knee condition. In fact, patients with a unilateral knee condition ambulate less and cannot put more than full body weight on either knee. Trauma is not a metastatic condition. Rather[,] the presence of similar findings in both knees is consistent with age-related degeneration, or a systemic disorder." Dr. Fries advised that appellant's accepted right knee

[6] Appellant submitted a progress report from Dr. Kahn dated August 26, 2019.

[7] A.M.A., *Guides to the Evaluation of Disease and Injury Causation* (2nd ed. 2013).

[8] Dr. Fries indicated that OWCP had accepted left rather than right knee degenerative arthritis and a meniscal tear; however, it is apparent that this is a typographical error.

condition had been aggravated by employment injuries in March 2014 and April 2016 and by an August 2019 motor vehicle accident, but advised that he had insufficient medical records to evaluate the status of his right knee.

By decision dated December 5, 2019, OWCP denied appellant's request to expand the acceptance of his claim to include a left knee condition causally related to his accepted employment injury.

On December 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on April 1, 2020. Counsel argued that Dr. Fries generally cited medical literature, but failed to provide a specific opinion regarding appellant. He further noted that Dr. Fries advised that he did not have medical evidence prior to May 2009. Counsel also asserted that Dr. Fries contracted the SOAF in finding that appellant's right knee condition was not employment related.

By decision dated May 11, 2020, OWCP's hearing representative affirmed the December 5, 2019 decision.[9]

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.[10]

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.[11] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.[12]

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."[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 a case is referred to an impartial medical examiner (IME) for the purpose of resolving the conflict, the opinion of such specialist, if

[9] The hearing representative noted that OWCP should administratively combine the current case record with OWCP File No. xxxxxx858.

[10] *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

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

[12] *See T.S.*, Docket No. 18-1702 (issued October 4, 2019).

[13] 5 U.S.C. § 8123(a).

[14] *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

sufficiently well rationalized and based on a proper factual background, must be given special weight.[15]

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical opinion evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[16] If the IME fails to respond or does not provide an adequate response, it should refer appellant for a new impartial medical examination.[17]

ANALYSIS

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

OWCP properly determined that a conflict in medical opinion existed between Dr. Kahn, appellant's physician, and Dr. Barr, who provided a second opinion examination, regarding whether the acceptance of appellant's claim should be expanded to include additional conditions due to his accepted right knee degenerative joint disease and lateral meniscal tear. It referred him to Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination under 5 U.S.C. § 8123(a).[18]

When a case is referred to an IME 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.[19]

The Board finds that Dr. Fries' opinion is not entitled to the special weight afforded an IME as he failed to provide sufficient rationale in support of his causation finding. On November 18, 2019 Dr. Fries discussed appellant's work history and the medical reports of record and provided detailed examination findings. He diagnosed bilateral degenerative knee arthritis and chondrocalcinosis after a right knee arthroscopic debridement, diabetes mellitus, a left foot diabetic infection and abscess, resolved after surgery, and peripheral polyneuropathy, likely diabetic. Dr. Fries opined that appellant's left knee condition was unrelated to the accepted employment injury to the right knee. He provided as rationale a reference to the A.M.A., *Guides to the Evaluation of Disease and Injury Causation*. The Board has held that medical texts and excerpts from publications are for general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the

[15] *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *D.M.*, Docket No. 17-1411 (issued June 7, 2018).

[16] *See M.M.*, Docket No. 20-1524 (issued April 20, 2021); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner(Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

[17] *See M.M., id.*; *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010).

[18] *G.B.*, Docket No. 19-1510 (issued February 12, 2020); *R.H.*, 59 ECAB 382 (2008).

[19] *Supra* note 15.

employee.[20] Dr. Fries failed to explain the significant of these general principles to appellant's specific situation.[21] He additionally advised that similar findings in both knees supported age-related degeneration or a systemic disorder; however, the Board notes that OWCP accepted appellant's right knee degenerative joint disease as employment related.

The opinion of a referee physician or IME is given special weight only when the physician's report is sufficiently rationalized and based upon a proper factual background.[22] Dr. Fries' report lacks medical reasoning to support his conclusory statements about the claimant's condition and, thus, it is insufficient to resolve a conflict in the medical evidence.[23]

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[24] When it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[25]

On remand, OWCP shall provide Dr. Fries with all relevant medical records and obtain a supplemental report sufficient to resolve the conflict regarding whether appellant's left knee condition is causally related to factors of his federal employment or occurred a consequence of his accepted right knee condition. If Dr. Fries is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.[26] Following this and any other further development as deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

[20] *A.S.*, Docket No. 17-1033 (issued October 23, 2017); *C.B.*, Docket No. 16-1713 (issued April 21, 2017); *Gloria J. McPherson*, 51 ECA 441 (2000).

[21] *C.B.*, *id.*; *J.R.*, Docket No. 12-1639 (issued January 22, 2013).

[22] *See M.P.*, Docket No. 16-0551 (issued May 19, 2017).

[23] *A.S.*, *supra* note 20.

[24] *See C.T.*, Docket No. 19-0508 (issued September 5, 2019); *K.S.*, Docket No. 18-0845 (issued October 26, 2018).

[25] *See supra* note 16.

[26] *R.H.*, Docket No. 17-1903 (issued July 5, 2018); *J.W.*, Docket No. 15-0020 (issued August 17, 2016); *Harold Travis*, *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2020 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: July 30, 2021
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board