

Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a permanent aggravation of right hip and knee osteoarthritis; (2) whether OWCP abused its discretion in denying appellant's request for subpoenas; and (3) whether it properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 14, 2015 appellant, then a 71-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment accelerated right hip and knee osteoarthritis. In a narrative statement, he described his letter carrier duties beginning in 1986. Appellant reported that he underwent right knee arthroscopic surgery on January 5, 1999 and that in 2009 he began experiencing right knee pain when walking and standing. He related that he began having right hip pain in 2004, and on January 12, 2006 he underwent a right hip replacement.

In a February 7, 2015 report, Dr. Byron V. Hartunian, an orthopedic surgeon, noted appellant's medical and surgical history, his description of job duties, and his complaints of right knee and hip pain and stiffness. He reviewed some medical records including a September 18, 2013 right knee x-ray that showed degenerative changes. On examination appellant demonstrated discomfort on combined flexion and rotation at the right groin area, and swelling and moderate tenderness over the right knee medial joint line. Dr. Hartunian diagnosed status post right total hip replacement for end-stage degenerative arthritis with secondary surgery needed to treat heterotopic bone formation, which resulted in severe right hip mobility restriction, and degenerative right knee arthritis with 1 millimeter (mm) of cartilage interval at the medial femorotibial joint. He advised that appellant had reached maximum medical improvement regarding his right hip on September 25, 2007 and regarding his right knee on March 17, 2009. Dr. Hartunian opined that appellant's regular job duties of constant and repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting exerted repeated stress to appellant's lower extremities causing chronic inflammation that accelerated

² Appellant submitted a timely oral argument request before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because a supervisor allegedly falsified an injury report to conceal his absence from duty. The Board, in exercising its discretion, denies his request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

³ 5 U.S.C. § 8101 *et seq.*

articular cartilage loss and contributing to the development and progression of his right lower extremity arthritis. He cited to medical literature that supported his opinion.⁴

In a development letter dated April 13, 2015, OWCP notified appellant of the factual deficiencies of his claim and advised him of the type of medical evidence needed. It provided a questionnaire for his completion and afforded him 30 days to submit the necessary evidence.

A notice dated April 20, 2015 indicated that appellant was retiring from the employing establishment, effective May 29, 2015.

In correspondence dated April 29, 2015, counsel responded to the April 13, 2015 development letter. He maintained that Dr. Hartunian's report was sufficient to establish appellant's claim. Counsel attached appellant's questionnaire responses in which he indicated that his old medical records were no longer available.

On June 30, 2015 OWCP referred appellant, the medical record, a set of questions, and a statement of accepted facts (SOAF) to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant's right hip and knee conditions were causally related to appellant's work activities. In an August 4, 2015 report, Dr. Geary noted his review of the medical record and appellant's description of his work and medical history. He also related appellant's physical examination findings. Dr. Geary opined that appellant's right hip and knee conditions were not related to his work activities, but rather to chronic degenerative osteoarthritis. He advised that the work activities would have caused a temporary aggravation of both conditions that would have ceased one or two months after he ceased all work activities. Dr. Geary opined that there was no causation or acceleration due to appellant's work and that, while the right total hip arthroplasty was necessary given appellant arthritis, it was not due to his federal work activities. He concluded that appellant suffered from chronic degenerative osteoarthritis that was an underlying condition and not due to appellant's work activities.

By decision dated August 17, 2015, OWCP accepted temporary aggravation of right hip osteoarthritis, resolved July 29, 2015, and temporary aggravation of right knee osteoarthritis, resolved July 29, 2015.

On September 4, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated November 30, 2015, the hearing representative reversed the August 17, 2015 decision. She found that a conflict in the medical evidence existed between the opinions of Dr. Hartunian, appellant's physician, and Dr. Geary, OWCP's referral physician, regarding whether the accepted aggravations of appellant's right hip and knee osteoarthritis were temporary or permanent.

On March 24, 2016 OWCP referred appellant to Dr. John H. Chaglassian, Board-certified in orthopedic surgery, for an impartial medical evaluation. In an April 27, 2016 report,

⁴ Appellant also submitted additional medical evidence regarding his prior treatment for his right knee and right hip conditions and a position description.

Dr. Chaglassian noted his review of the medical record, a medical history provided by appellant, and his complaints of intermittent right knee swelling and intermittent right hip pain. Right knee examination demonstrated no effusion, redness, or heat, and some synovial hypertrophy. A varus deformity was present with no ligamentous instability and normal patellar tracking. Neurovascular examination was normal. Right hip examination demonstrated no tenderness and discomfort with flexion to 90 degrees. Dr. Chaglassian noted that appellant reported that he did not sustain a specific work injury and opined that he had a predisposition for progressive arthritis in the joints that was not work related. He continued that, although appellant's total hip replacement was reasonable and necessary, it was not due to appellant's federal job duties. Dr. Chaglassian concluded that appellant may have sustained a temporary aggravation of his right hip and knee arthritis related to work, but this would have ceased a few months after he stopped work.

By decision dated May 9, 2017, OWCP found that the special weight of the medical evidence rested with the opinion of Dr. Chaglassian and reiterated that the accepted conditions were temporary aggravations of right hip and knee osteoarthritis, resolved January 29, 2015.

On May 30, 2017 appellant, through counsel, again requested a hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on October 25, 2017, counsel asserted that Board case law and OWCP procedures were supportive that appellant sustained permanent aggravation, and that the reports of Dr. Geary and Dr. Chaglassian were not well rationalized. Appellant testified regarding his work duties and indicated that his right hip and knee conditions did not improve after his retirement.

By decision dated February 5, 2018, an OWCP hearing representative set aside the May 9, 2017 decision and remanded the case for OWCP to obtain a supplemental opinion from Dr. Chaglassian followed by a *de novo* decision regarding the nature and extent of appellant's work-related aggravation of right knee and hip osteoarthritis, whether such aggravation was temporary or permanent, if temporary, whether it had ceased and when, and whether the evidence supported expansion of the claim for work-related acceleration of right hip and/or right knee osteoarthritis.

On March 1, 2018 OWCP asked Dr. Chaglassian to furnish a supplemental report. It enclosed the original case record, a SOAF dated February 27, 2018 that included the accepted conditions of temporary aggravations of right hip and right knee osteoarthritis, and a description of appellant's job duties. OWCP also included specific questions regarding appellant's job duties and the cause of his right lower extremity osteoarthritis.

In a May 17, 2018 report, Dr. Chaglassian noted his April 27, 2016 evaluation. He opined that the medical literature did not support that an individual was more likely to develop arthritis because of a certain job such as a letter carrier. Dr. Chaglassian indicated that appellant did not report that he had sustained direct hip or knee injuries, and opined that the need for total hip replacement was primarily related to progressive arthritis and not because of appellant's work duties as a letter carrier. He advised that he was in agreement with Dr. Geary. Dr. Chaglassian concluded, within a reasonable degree of medical certainty, that the fact that a temporary aggravation was accepted did not alter his opinion that the temporary aggravation of arthritis in the right hip and knee related to appellant's work would have ceased when he retired and was not a permanent aggravation.

By decision dated May 23, 2018, OWCP found that appellant had not established permanent aggravation of right hip and right knee osteoarthritis. It found that the weight of the medical evidence rested with the opinion of Dr. Chaglassian.

On June 5, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on November 29, 2018. Counsel argued that the opinions of Dr. Geary and Dr. Chaglassian were of diminished probative value. Following the hearing, appellant submitted a January 2, 2019 statement in which he indicated that Dr. Chaglassian had not questioned him regarding his right hip and knee conditions since retirement and maintained that appellant continued to have pain in both. Counsel submitted evidence previously of record and a May 3, 2018 report in which Dr. Justin Kung, a Board-certified radiologist, noted his review of an April 23, 2018 right knee x-ray. He indicated that these demonstrated that the right medial compartment space interval measured 0.0 mm, with bone-on-bone contact and subchondral sclerosis, and that the lateral compartment joint space interval measured 9.0 mm. Dr. Kung noted tricompartmental osteophytes and concluded that there was severe degenerative change in the right knee medial compartment.

By decision dated February 5, 2019, the hearing representative set aside the May 23, 2018 decision, finding that Dr. Chaglassian's opinion was not supported by probative medical rationale. She remanded the case for OWCP to ask Dr. Chaglassian for a well-reasoned explanation as to how and why appellant's work activities were insufficient to result in a permanent aggravation of his right hip and knee arthritis. If Dr. Chaglassian was unwilling to provide a sufficient response, she indicated a new referee examination should be scheduled.

On February 20, 2019 OWCP asked Dr. Chaglassian to provide a well-reasoned explanation as to how or why appellant's work activities were insufficient to result in permanent aggravation of his right hip and right knee conditions. It asked that he explain how a progressive arthritic condition could be temporary in nature or return to a baseline condition once it was aggravated.

In a March 6, 2019 response, Dr. Chaglassian referred to his May 17, 2018 report. He indicated that arthritis was not associated or caused by certain progression, which involved prolonged standing, bending, lifting, getting in and out of or driving trucks, noting that it was unknown why some people got arthritis. Dr. Chaglassian opined that there was no work-related progression or temporary aggravation related to appellant's employment duties.

In a *de novo* decision dated July 17, 2019, OWCP reiterated that appellant had only established temporary aggravation of right hip and right knee osteoarthritis, resolved on July 29, 2015.

On July 23, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On August 21, 2019 counsel requested subpoenas for Dr. Geary and Dr. Chaglassian or that they be asked additional questions, which he provided. He also submitted two reports from Dr. Chaglassian regarding other individuals, not appellant.

In correspondence dated September 16, 2019, OWCP's hearing representative denied the request for issuance of subpoenas.

A hearing was held on October 22, 2019.

By decision dated December 2, 2019, the hearing representative affirmed the July 17, 2019 decision. She formally denied appellant's request for subpoenas and found that the medical evidence of record was insufficient to establish that he sustained a permanent aggravation or acceleration of right knee or hip osteoarthritis.

On February 21, 2010 appellant, through counsel, requested reconsideration. Counsel submitted evidence previously of record and continued to maintain that Dr. Chaglassian's opinion was not well rationalized.

By decision dated May 21, 2010, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

When 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.⁵

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁶ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. 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 factors.⁷

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."⁸ In situations where 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 such

⁵ *C.C.*, Docket No. 19-1948 (issued January 8, 2021); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *T.H.*, 59 ECAB 388; *Robert G. Morris*, 48 ECAB 238 (1996).

⁷ *C.D.*, Docket No. 20-0762 (issued January 13, 2021); *B.C.*, Docket No. 20-0221 (issued July 10, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁸ 5 U.S.C. § 8123(a).

specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

The Federal (FECA) Procedure Manual provides that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim, as set forth in the SOAF.¹⁰ When OWCP's referral physician or impartial medical specialist does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.¹¹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision regarding whether appellant sustained permanent aggravation of right hip and knee osteoarthritis.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Hartunian, an attending physician, and Dr. Geary, an OWCP referral physician regarding appellant's alleged right hip and knee conditions. In order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a), OWCP referred appellant, the medical record, and a SOAF to Dr. Chaglassian for an impartial medical examination and an opinion on the matter.

In his April 27, 2016 report, Dr. Chaglassian opined that, while appellant may have sustained a temporary aggravation of his right hip and knee arthritis related to work, this would have ceased a few months after he stopped work. In a May 17, 2018 supplemental report, he indicated that the accepted temporary aggravation of arthritis in the right hip and knee related to appellant's work would have ceased when he retired and was not a permanent aggravation. In a March 6, 2019 supplemental opinion, Dr. Chaglassian referred to his May 17, 2018 report. He indicated that arthritis was not associated or caused by certain professions that involved prolonged standing, bending, lifting, getting in and out of or driving trucks, writing that it was unknown why some people got arthritis. Dr. Chaglassian opined that there was no work-related progression or temporary aggravation related to appellant's job. In his March 6, 2019 report, he advised that there was no work-related progression or temporary aggravation related to appellant's job.

The Board finds that Dr. Chaglassian, however, failed to acknowledge OWCP's prior determination, as set forth in the SOAF, that the accepted employment factors were sufficient to cause an aggravation of appellant's right hip and knee osteoarthritic condition. Dr. Chaglassian opinion is, therefore, of diminished probative value regarding whether appellant sustained a work-related permanent aggravation of his right hip and knee conditions and, thus, is insufficient to carry the special weight of the medical evidence.¹² As such, a conflict in medical evidence remains.

⁹ *N.G.*, Docket No. 20-0557 (issued January 5, 2021); *R.H.*, 59 ECAB 382 (2008).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.810.11a (September 2019).

¹¹ *Id.* at Chapter 3.600.3(a) (October 1990).

¹² *See S.B.*, Docket No. 20-0675 (issued November 23, 2020).

Therefore, in order to resolve the conflict in the medical opinion evidence, the case will be remanded to OWCP for referral of the case record, including an updated SOAF, to a new impartial medical specialist for examination and for a rationalized medical opinion, which evaluates whether appellant sustained a permanent aggravation of preexisting degenerative osteoarthritis causally related to the accepted factors of his federal employment. After this and other such further development OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision with respect to whether appellant established permanent aggravation of right hip and knee osteoarthritis.¹³

ORDER

IT IS HEREBY ORDERED THAT the May 21, 2020 and December 2, 2019 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 16, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹³ In light of the Board's disposition of Issue 1, Issues 2, and 3 are rendered moot.