

**United States Department of Labor
Employees' Compensation Appeals Board**

S.M., Appellant)	
)	
and)	Docket No. 21-0149
)	Issued: June 21, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Chicago, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 11, 2020 appellant, through counsel, filed a timely appeal from a September 21, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 September 21, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include additional left knee torn meniscus and arthritis conditions as a consequence of his accepted April 16, 2013 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 17, 2013 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 16, 2013 he injured his right knee and foot when he fell on a collapsed porch while in the performance of duty. He stopped work on that day. OWCP accepted appellant's claim for right foot contusion, right knee and foot sprain, right knee and foot edema, bilateral buttock contusion, and lumbosacral sprain and subsequently expanded acceptance of his claim to include aggravation of lumbosacral spondylosis. It paid appellant wage-loss compensation on the supplemental rolls beginning June 1, 2013 and placed him on the periodic rolls, effective May 4, 2014.⁵

On July 8, 2015 OWCP expanded acceptance of appellant's claim to include acceleration of underlying right knee medical compartment arthritis.

On August 28, 2017 appellant returned to full-duty work.

Appellant continued to receive medical treatment. In a September 30, 2017 report, Dr. Florian Miranzadeh, an osteopath Board-certified in family medicine, indicated that, while undergoing physical therapy treatment on May 10, 2017 for a work-related right knee injury, appellant noticed left knee pain. He provided left knee examination findings and noted that a left knee magnetic resonance imaging (MRI) scan demonstrated a tear of the posterior horn of the medial meniscus with adjacent small para meniscal cyst. Dr. Miranzadeh opined that appellant sustained a consequential left knee injury as a result of his work-related right knee injury. He explained that appellant had to walk for a significant amount of time with a cane due to his accepted right knee injuries, which caused unbalanced pressure on his left knee.

In an October 13, 2017 report, Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed appellant's history of injury and noted his disagreement with Dr. Miranzadeh's opinion that appellant sustained a consequential left knee injury as it was inconsistent with current medical thought.

On January 10, 2018 OWCP determined that a conflict in the medical opinion evidence existed between Dr. Miranzadeh and the DMA, regarding whether appellant sustained a left knee

⁴ Docket No. 19-0397 (issued August 7, 2019).

⁵ Appellant underwent several OWCP-approved surgeries, including lumbar surgery on February 15, 2014, right knee arthroscopic partial medial and partial lateral surgery on May 17, 2014, and total right knee arthroplasty on March 1, 2016.

torn meniscus and arthritis as a consequence of his April 16, 2013 employment injury. It referred appellant for an impartial medical examination in order to resolve the conflict of medical opinion. In a February 5, 2018 report, Dr. Hythem P. Shadid, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), noted his review of the statement of accepted facts (SOAF) and appellant's medical records. He listed appellant's accepted conditions and recounted appellant's current complaints of left medial knee pain with strenuous activity and pivoting. In response to OWCP's questions, Dr. Shadid opined that there was no scientific evidence to support the conclusion that appellant's current degenerative left knee condition, including the degenerative medial meniscus tear, was consequential to the accepted April 16, 2013 employment injury.

In a decision dated March 9, 2018, OWCP denied expansion of the acceptance of appellant's claim to include a consequential left knee injury. It found that the special weight of the medical evidence rested with the February 5, 2018 report of Dr. Shadid, the IME, who opined that the medical evidence of record was insufficient to establish that the additional left knee conditions were causally related to his April 16, 2013 employment injury.

On March 16, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated October 2, 2018, OWCP's hearing representative affirmed the March 9, 2018 decision.

Appellant, through counsel, filed an appeal before the Board.

In an August 7, 2019 decision, the Board set aside the October 2, 2018 decision. It found that an unresolved conflict in medical opinion evidence existed between Dr. Shadid, OWCP's referral physician, and Dr. Miranzadeh, appellant's treating physician, regarding whether appellant sustained a consequential left knee condition due to his accepted April 16, 2013 right knee injury and remanded the case for referral to an IME pursuant to 5 U.S.C. § 8123(a).⁶

Appellant submitted additional medical evidence following the October 2, 2018 OWCP decision. In reports dated November 19, 2018 through June 26, 2019, Dr. Jeffrey S. Meisles, a Board-certified orthopedic surgeon, recounted appellant's complaints of right knee and hip pain. He provided physical examination findings and assessed bilateral hip arthritis and right hip trochanteric bursitis.

In a July 31, 2019 letter, counsel requested that the acceptance of appellant's claim be expanded to include bilateral hip osteoarthritis and right hip trochanteric bursitis.

In a work status note dated December 4, 2019, Dr. Miranzadeh indicated that appellant was fully incapacitated from work from December 7, 2019 through January 9, 2020.

On January 15, 2020 OWCP referred appellant, along with a SOAF and the medical record, to Dr. James R. Bresch, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict of medical opinion evidence, regarding whether

⁶ The Board determined that the October 13, 2017 DMA's report lacked sufficient medical rationale to create a conflict in medical opinion evidence with Dr. Miranzadeh.

appellant sustained a left knee torn meniscus and arthritis as a consequence of his accepted April 16, 2013 employment injury.

In a February 10, 2020 report, Dr. Bresch noted that appellant sustained right knee and foot and low back injuries after an April 2013 fall. He recounted that on May 10, 2017 appellant was participating in physical therapy for his right knee when he experienced a new onset of left knee pain. Dr. Bresch indicated that subsequent diagnostic testing revealed a degenerative tear of the left knee medial meniscus and medial compartmental osteoarthritis. Upon physical examination of appellant's left knee, he observed positive medial joint line tenderness and positive Apley and McMurray signs, consistent with a medial meniscus tear. Dr. Bresch assessed degenerative tear of the medial meniscus and mild medial compartment osteoarthritis of the left knee. He opined that, although appellant had a prolonged history of right knee difficulties following his accepted April 2013 claim, he "[did] not feel that these [two] events are causally related." Dr. Bresch explained that, within the "orthopedic literature," there were no documented studies that suggested that in the rehabilitation process following a total knee arthroplasty there was any increased incidence of a meniscal tear on the contralateral extremity without a specific additional traumatic episode or event. Regarding whether appellant's left knee condition resulted from overuse, he reported that statistical studies showed that, because appellant was never in a protected weight bearing status on the right side, there had not been significant excessive compressive loads on the right. Dr. Bresch concluded that appellant's left knee medial meniscus degenerative tear and arthritis were not causally related to the April 2013 "accident."

By decision dated April 6, 2020, OWCP denied expansion of the acceptance of appellant's claim to include a consequential left knee injury, finding that the medical evidence of record was insufficient to establish that the additional conditions were causally related to his April 16, 2013 employment injury.

On April 10, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 14, 2020. Counsel argued that the IME, Dr. Bresch, merely echoed the opinion of the second opinion examiner and erroneously relied on medical literature, rather than objective medical evidence.

Appellant subsequently submitted a narrative report dated September 9, 2020 by Dr. Miranzadeh who recounted appellant's complaints of continued difficulty with his right knee despite surgery and physical therapy. Dr. Miranzadeh reported right knee examination findings of mild swelling, tenderness to palpation, and decreased range of motion. He diagnosed right knee sprain, status post right knee total arthroplasty, right foot plantar fasciitis secondary to the right knee sprain, and lumbosacral spondylolysis. Dr. Miranzadeh authorized appellant to continue to work with specific restrictions and recommended physical therapy and a home exercise program.

By decision dated September 21, 2020, OWCP's hearing representative affirmed the April 6, 2020 decision. She found that the special weight of the medical evidence rested with Dr. Bresch, the IME, who opined, in a February 10, 2020 report, that appellant's left knee medial meniscus tear was not causally related or consequential to his accepted April 16, 2013 employment injury.

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

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.⁸ The basic rule is that a subsequent injury, whether 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.⁹ With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.¹⁰

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.¹¹ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹² Additionally, the opinion of the physician 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 the specific employment factor(s) identified by the claimant.¹³

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 IME) who shall make an examination.¹⁴ This is called an impartial medical examination and OWCP will select a physician who is qualified

⁷ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁸ *C.W.*, Docket No. 18-1536 (issued June 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

⁹ *R.M.*, Docket No. 18-1621 (issued August 23, 2019); *Debra L. Dilworth*, 57 ECAB 516 (2006).

¹⁰ *K.C.*, Docket No. 19-1251 (issued January 24, 2020); *R.V.*, Docket No. 18-0552 (issued November 5, 2018); *L.S.*, Docket No. 08-1270 (issued July 2, 2009).

¹¹ *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹² *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹³ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁴ 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).

in the appropriate specialty and who has no prior connection with the case.¹⁵ 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 upon a proper factual background, must be given special weight.¹⁶

ANALYSIS

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

In the prior appeal, the Board remanded the case to OWCP to obtain a report from an IME who was to determine whether appellant sustained left knee medial meniscus tear and arthritis conditions as a consequence of his accepted April 16, 2013 employment injury. OWCP subsequently referred appellant to Dr. Bresch for an impartial medical examination in order to resolve the conflict in the medical evidence.

As noted, 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 upon a proper factual background, must be given special weight.¹⁷ In this case, the Board finds that the report of Dr. Bresch, serving as the IME, lacked sufficient medical rationale to carry the special weight of the medical evidence.¹⁸ In his February 10, 2020 report, Dr. Bresch diagnosed left knee degenerative tear of the medial meniscus and mild medial compartment osteoarthritis and noted appellant's history of right knee difficulties. He reported that he did not "feel that these [two] events are causally related." The Board finds that Dr. Bresch's opinion is equivocal and speculative as he did not definitely opine on whether appellant sustained consequential left knee conditions.¹⁹ The Board has held that medical opinions which are equivocal or speculative are of diminished probative value.²⁰

The Board notes that, in support of his opinion, Dr. Bresch merely referenced "orthopedic literature" and "documented studies" and provided a general conclusion regarding causal relationship. The Board finds, therefore, that he did not provide sufficient medical rationale to support his conclusion.²¹ The Board has found that when an IME fails to provide medical

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁷ *Id.*

¹⁸ *See V.K.*, Docket No. 19-0422 (issued June 10, 2020).

¹⁹ *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *F.D.*, Docket No. 18-1596 (issued June 18, 2019).

²⁰ *T.M.*, Docket No. 19-1414 (issued February 12, 2020); *S.R.*, Docket No. 16-0657 (issued July 13, 2016); *Minnie Cook*, Docket No. 99-1848 (issued December 20, 2000).

²¹ A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale. *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *see V.T.*, Docket No. 18-0881 (issued November 19, 2018); *T.M.*, Docket No. 08-975 (issued February 6, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.²² Accordingly, the Board finds that Dr. Bresch's opinion lacks the specificity and detail needed to carry the special weight of the medical evidence.

The Board has also held that, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report to correct the defect in the original report.²³ Accordingly, the case will be remanded to OWCP for a fully-rationalized opinion from Dr. Bresch, based upon an accurate history, regarding whether appellant sustained an additional left knee condition as a consequence of his accepted April 16, 2013 employment injury. If Dr. Bresch is unable to clarify his opinion or if his requested supplemental report is also lacking rationale, OWCP shall refer appellant to a new IME for the purpose of obtaining a rationalized medical opinion on the issue.²⁴ Following this and any other such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

²² *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *P.F.*, Docket No. 13-0728 (issued September 9, 2014); *James T. Johnson*, 39 ECAB 1252 (1988).

²³ *S.P.*, Docket No. 20-0418 (issued February 19, 2021); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11.c (September 2010).

²⁴ *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 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: June 21, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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