

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

S.W., Appellant	)	
	)	
and	)	<b>Docket No. 21-0290</b>
	)	<b>Issued: November 5, 2021</b>
U.S. POSTAL SERVICE, CLEVELAND	)	
HEIGHTS POST OFFICE,	)	
Cleveland Heights, OH, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 23, 2020 appellant, through counsel, filed a timely appeal from a September 2, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence to OWCP following the September 2, 2020 decision. 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 her burden of proof to expand the acceptance of her claim to include a right labral tear as causally related to her accepted February 28, 2012 employment injury.

## **FACTUAL HISTORY**

On February 28, 2012 appellant, then a 43-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to both knees when she tripped on a mail strap while in the performance of duty. She stopped work on February 28, 2012. OWCP accepted the claim for bilateral knee contusions.<sup>4</sup> Appellant returned to limited-duty work on or about March 20, 2012. Dr. John H. Wilber, a Board-certified orthopedic surgeon, released her to full-duty work effective April 30, 2012.

Thereafter, Dr. Wilber submitted periodic reports through August 30, 2012, noting continued right hip pain. He administered a series of lidocaine injections to the right trochanteric bursa. In a November 1, 2012 report, Dr. Wilber noted increasing right hip and right-sided groin pain radiating into the thigh. He noted that, as x-rays did not indicate “real traumatic changes,” there could be “something in the soft tissues, such as a labral-type tear.” Dr. Wilber noted in a February 18, 2013 report that a February 5, 2013 magnetic resonance imaging (MRI) scan of the right hip demonstrated moderate degenerative changes consistent with trochanteric bursitis “which [was] probably traumatic and aggravation of her hip pain.”<sup>5</sup> He submitted periodic reports through March 11, 2014 diagnosing right trochanteric bursitis.

On May 5 and August 6, 2014 OWCP expanded its acceptance of the claim to include right trochanteric bursitis and enthesopathy of the right hip.

In a January 5, 2016 report, Dr. Timothy J. Nice, a Board-certified orthopedic surgeon, diagnosed bilateral hip bursitis. In reports through May 3, 2016, he attributed appellant’s right hip pain to a tight iliotibial band with secondary bursitis. Dr. Nice explained in an August 23, 2016 report that the tight iliotibial band caused right trochanteric bursitis as it had irritated the bursa when she walked up and down inclines and stairs carrying a heavy mail satchel. In a May 1, 2018 report, he opined that as appellant’s right hip pain radiated into the groin, and she had fallen directly onto her right knee, that she could have labral pathology and not trochanteric bursitis.

In a report dated September 13, 2018 report, Dr. Nice noted that an August 14, 2018 MRI scan of the right hip demonstrated a labral tear.<sup>6</sup> He opined that the accepted injury caused the labral tear because appellant had no prior complaints or buttock pain. Dr. Nice requested that OWCP expand its acceptance of the claim to include a labral tear of the right hip.

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<sup>4</sup> OWCP paid appellant wage-loss compensation on the supplemental rolls from April 24 through 30, 2012.

<sup>5</sup> A February 5, 2013 MRI scan of the hips showed mild bilateral trochanteric bursitis and mild bilateral osteoarthritis.

<sup>6</sup> An August 14, 2018 MRI scan of the right hip demonstrated abnormal signal and morphology of the anterior superior labrum consistent with a degenerative-type tear, with soft tissue edema at the greater trochanter extending into the distal gluteus medius and minimus muscles.

In a development letter dated December 10, 2018, OWCP notified appellant of the additional evidence needed to expand the acceptance of her claim to include a labral tear of the right hip. It afforded her 30 days to submit the necessary evidence.

OWCP received additional reports by Dr. Nice dated December 17, 2018 through January 29, 2019 in which he opined that the mechanism of the accepted February 28, 2012 employment injury, where appellant tripped over a strap, twisted her right leg, and then fell forward onto her knees with the right lower extremity angled outward, was competent to cause a right labral tear. Dr. Nice noted that trochanteric bursitis had been a misdiagnosis, as her symptoms were generated by the muscles beneath the bursa.

On February 4, 2019 OWCP referred appellant, along with statement of accepted facts (SOAF), to Dr. William R. Bohl, a Board-certified orthopedic surgeon, for a second opinion on the nature of the work-related condition and any attendant disability. In a March 26, 2020 report, Dr. Bohl reviewed the medical record and SOAF. He related that appellant first experienced right hip pain during physical therapy prescribed to treat the accepted knee injuries. Dr. Bohl diagnosed a “partial tearing or tendinitis of the gluteus medius and minimus,” which was “likely” caused by “one of the exercises in physical therapy” for her knees as it was degenerative in nature and not the result of an acute injury. He noted work restrictions.

On April 10, 2019 OWCP expanded its acceptance of the claim to include aggravation of chondromalacia of the patella of both knees, gluteal tendinitis of the right hip, other specified enthesopathies of the right lower limb, and enthesopathy of the right hip region.

On April 10, 2019 OWCP forwarded Dr. Bohl’s report to Dr. Nice for review and comment. In a May 2, 2019 report, Dr. Nice expressed his disagreement with Dr. Bohl’s opinion. He opined that the August 14, 2018 MRI scan demonstrated “abnormal signal morphology of the anterior superior labrum that was consistent with a degenerative-type tear in the labrum” and inflammatory changes in the gluteus medius and minimus muscles indicative of a strain injury. Dr. Nice explained that it was immaterial whether the right labral tear was acute or degenerative, as it was related to the February 28, 2012 fall in either case.

In July 2019, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Nice, the attending physician, and Dr. Bohl, OWCP’s referral physician, on the issue of whether appellant sustained a right labral tear causally related to the accepted employment injury, and the nature of her ongoing condition. In order to resolve the conflict, it referred her, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to Dr. Dennis A. Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the issue.

In an August 30, 2019 report, Dr. Glazer reviewed the medical record and SOAF. On examination of the right lower extremity he noted tenderness over the greater trochanter, right-sided groin pain when flexing or abducting the right hip, gluteal tendinitis of the right hip, and residual of aggravation of bilateral patellar chondromalacia. Dr. Glazer opined both that appellant continued to suffer from the effects of the accepted employment conditions. He noted that the imaging studies did not demonstrate a labral tear of the right hip and that the second MRI scan showed a degenerative labral tear. Dr. Glazer pointed out that issues with appellant’s right hip “were not noted until several weeks after the work injury,” and that she had no evidence of hip problems during the emergency room visit. He concluded that a right hip labral tear was “not

present” and was unrelated to the accepted February 28, 2012 employment injury “by any means of causation.”

By decision dated October 11, 2019, OWCP denied expansion of the acceptance of the claim to include right hip labral tear. It found that the special weight of the medical evidence rested with the opinion of Dr. Glazer as the impartial medical specialist.

On October 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on February 7, 2020.

By decision dated March 17, 2020, the hearing representative affirmed the October 11, 2019 decision.

On August 31, 2020 appellant, through counsel, requested reconsideration. In support of the request, she provided a March 10, 2020 report by Dr. Nice, noting that her right hip symptoms began within a week of the February 28, 2012 employment injury. Dr. Nice explained that the August 14, 2018 MRI scan, performed six years after the accepted injury, would be expected to demonstrate chronic changes and fraying of the labrum, in addition to chronic gluteus medius and minimus tendinitis.

In an August 11, 2020 report, Dr. Nice asserted that Dr. Bohl misdiagnosed gluteal tendinitis and not trochanteric bursitis as he was confused by the edema in the gluteus medius and minimus directly adjacent to the trochanteric bursa. He diagnosed a labral tear in the left hip as well as the right hip.

By decision dated September 2, 2020, OWCP denied modification of its March 17, 2020 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.<sup>7</sup>

To establish causal relationship between the claimed condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>9</sup> The weight of medical evidence is

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<sup>7</sup> *D.B.*, Docket No. 20-1280 (issued March 2, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>8</sup> *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>9</sup> *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K., id.; I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>10</sup>

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. 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.<sup>11</sup>

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."<sup>12</sup> 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.<sup>13</sup> Where a case is referred to an impartial medical specialist 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.<sup>14</sup>

### ANALYSIS

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

OWCP found that a conflict of medical opinion existed between Dr. Nice and Dr. Bohl as to whether the accepted February 28, 2012 employment injury caused a right labral tear. It referred appellant to Dr. Glazer for an impartial medical evaluation to resolve the conflict, pursuant to 5 U.S.C. § 8123(a). The Board has held that if there is a disagreement between OWCP's physician and appellant's physician, OWCP will appoint a third physician who shall make an examination.<sup>15</sup> For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.<sup>16</sup>

OWCP's second opinion physician, Dr. Bohl, opined that appellant "likely" sustained a right hip injury during unspecified physical therapy exercises prescribed to treat the accepted bilateral knee contusions. The Board finds, however, that Dr. Bohl's opinion was speculative and

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<sup>10</sup> See *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

<sup>11</sup> *D.B.*, *supra* note 7; see *V.K.*, Docket No. 19-0422 (issued June 10, 2020).

<sup>12</sup> 5 U.S.C. § 8123(a).

<sup>13</sup> *D.H.*, Docket No. 19-0687 (issued March 31, 2021); *T.J.*, Docket No. 20-0721 (issued November 17, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 12. See *R.M.*, Docket No. 19-0163 (issued July 17, 2019).

<sup>16</sup> *R.M.*, *id.*; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

inconsistent and, thus, of diminished probative value.<sup>17</sup> Therefore, Dr. Bohl's report was not of equal weight to that of Dr. Nice.

As no true conflict existed in the medical evidence at the time of the referral to Dr. Glazer, the Board finds that his report may not be afforded the special weight of an impartial medical specialist and should instead be considered for its own intrinsic value.<sup>18</sup> The referral to Dr. Glazer is, therefore, considered to be for a second opinion evaluation.<sup>19</sup>

The Board finds that a conflict in the medical opinion evidence now exists between Dr. Nice and Dr. Glazer regarding whether appellant sustained a right labral tear causally related to the accepted February 28, 2012 employment injury. Therefore, OWCP shall refer her to an impartial medical specialist for a resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a). After this and other such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision in the case.

### CONCLUSION

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

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<sup>17</sup> *M.L.*, Docket No. 20-1682 (issued June 24, 2021); *see T.M.*, Docket No. 18-1418 (issued February 7, 2019); *S.S.*, Docket No. 17-0781 (issued August 1, 2018).

<sup>18</sup> *See F.R.*, Docket No. 17-1711 (issued September 6, 2018).

<sup>19</sup> *L.G.*, Docket No. 20-0611 (issued February 16, 2021). *See also M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that, at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the impartial medical specialist was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 2, 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: November 5, 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