

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

R.H., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. FEDERAL AIR MARSHAL SERVICE,)
Chelsea, MA, Employer)
-----)

Docket No. 21-1417
Issued: September 2, 2022

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 27, 2021 appellant, through counsel, filed a timely appeal from an August 20, 2021 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 August 20, 2021 decision, appellant submitted additional evidence to OWCP. 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 expand the acceptance of his claim to include right knee arthritis and a small osseous excrescence of the right knee as causally related to the accepted March 4, 2004 employment injury.

FACTUAL HISTORY

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

On April 15, 2004 appellant, then a 27-year-old air marshal, filed a traumatic injury claim (Form CA-1) alleging that he injured his knees on March 4, 2004 when thrown to the ground during a ground fighting training exercise while in the performance of duty. Prior to the present claim, appellant had claimed an October 17, 2002 right knee injury.⁵ OWCP accepted the present claim, under OWCP File No. xxxxxx713, for medial meniscal tear, lateral collateral ligament sprain, patellar chondromalacia of the right knee, and a left knee contusion.

On August 12, 2004 Dr. Mark J. Bulman, a Board-certified orthopedic surgeon, performed OWCP-authorized right knee arthroscopy with debridement of the lateral tibial plateau and posterior horn of the lateral meniscus. He diagnosed a chondral flap injury of the lateral tibial plateau and fraying of the posterior horn of the lateral meniscus.

Following intermittent work absences, appellant separated from the employing establishment, effective December 21, 2004. By decision dated November 29, 2007, OWCP found that appellant's actual weekly earnings of \$564.32 commencing September 21, 2007 as a juvenile probation officer fairly and reasonably represented his wage-earning capacity.⁶

On February 12, 2008 OWCP obtained a second opinion from Dr. William Dinenberg, a Board-certified orthopedic surgeon, who found an approximate 50 percent loss of lateral chondral cartilage in the right knee causally related to the employment injury.

In a January 20, 2009 report, Dr. Anthony J. Lombardo, a Board-certified orthopedic surgeon, diagnosed derangement of the right lateral meniscus and arthritis of the right lower leg. He restricted appellant to light-duty work. In January 28, 2010 and January 27, 2011 yearly follow-up reports, Dr. Lombardo found appellant's condition unchanged.

On December 11, 2018 OWCP obtained a second opinion from Dr. John Hearst Wellborn, Jr., a Board-certified orthopedic surgeon, to determine whether appellant continued to

⁴ Docket No. 19-1604 (issued October 9, 2020); Docket No. 08-1973 (issued May 1, 2009).

⁵ OWCP File No. xxxxxx730. The case record indicates that OWCP processed the claim as a short form closure. On April 16, 2004 OWCP administratively combined OWCP File No. xxxxxx730 with OWCP File No. xxxxxx713, with the latter file designated as the master file number.

⁶ On June 25, 2007 OWCP issued a schedule award for two percent permanent impairment of appellant's right lower extremity.

have residuals of his accepted conditions. Dr. Wellborn diagnosed chronic derangement of the posterior horn of the lateral meniscus of the right knee and status post partial lateral meniscectomy. He opined that imaging studies did not demonstrate arthritis.⁷

In a May 21, 2019 report, Dr. Fulton S. Chen, Board-certified in physiatry and pain medicine, provided a history of injury and treatment and reviewed medical records. He noted appellant's complaints of chronic right knee pain with occasional swelling, locking, and clicking. On examination of the right lower extremity, Dr. Chen observed healed arthroscopic portal scars, a small effusion of the right knee, tenderness along the right lateral joint line, slight warmth in the right knee compared to the left knee, right knee flexion limited to 110 degrees, negative Mc Murray and patellar grind tests, and no instability over the right knee with varus and valgus testing. He diagnosed status-post 2004 arthroscopic right knee surgery with partial lateral meniscectomy and chondroplasty of the lateral tibial plateau. Dr. Chen opined that the mild effusion and warmth over the right knee supported the presence of inflammation over the right knee. He explained that the 2004 partial meniscectomy permanently removed the cushioning effect of the meniscus, predisposing appellant to premature osteoarthritis of the right knee with pain and swelling. Appellant had experienced both "currently and has so for many years." Dr. Chen noted that appellant had attained maximum medical improvement (MMI). He recommended continued work restrictions.

In a May 25, 2019 magnetic resonance imaging (MRI) scan report of the right knee, Dr. Jonah Hirschbein, a Board-certified radiologist, noted that appellant had right knee pain and limited motion following surgery. He opined that the study demonstrated mild degeneration of the lateral meniscus without a focal tear, mild patellar tendinosis, grade III chondromalacia of the lateral patellar facet, median patellar ridge, and central femoral trochlea with otherwise grade II chondromalacia of the anterior compartment, and a nine mm osseous excrescence emanating from the posterior aspect of the proximal tibia with features typical of an osteochondroma.

In a letter dated September 26, 2019, appellant, through counsel, requested that OWCP expand the acceptance of his claim to include right knee osteoarthritis, mild degeneration of the right lateral meniscus without a focal tear, mild patellar tendinosis of the right knee, grade III chondromalacia of the lateral patellar facet, median patellar ridge, and central femoral trochlea with otherwise grade II chondromalacia of the anterior compartment, and a nine millimeter (mm) osseous excrescence emanating from the posterior aspect of the proximal tibia with features typical of an osteochondroma.

In a development letter dated May 5, 2020, OWCP notified appellant of the additional medical evidence needed to establish expansion of the acceptance of his claim to include additional right knee conditions. It afforded him 30 days to respond.

In response, in a letter dated June 17, 2020, counsel requested that OWCP schedule appellant for a second opinion examination as his attending physician had retired.

On July 23, 2020 OWCP referred appellant, the medical record, an updated SOAF, and a series of questions to Dr. Laura Sciaroni, a Board-certified orthopedic surgeon, for a second opinion examination on the nature and extent of appellant's employment-related knee conditions

⁷ December 27, 2018 bilateral knee x-rays were unremarkable.

and whether the acceptance of the claim should be expanded to include additional right knee conditions including osteoarthritis, mild degeneration of the lateral meniscus without a focal tear, mild patellar tendinosis, grade II chondromalacia of the lateral patellar facet, grade II chondromalacia of the anterior compartment, and a nine mm osseous excrescence emanating from the posterior aspect of the proximal tibia. In an October 1, 2020 report, Dr. Sciaroni noted her review of the SOAF and medical record. On examination, she observed right knee flexion limited to 118 degrees, no swelling, effusion, or synovitis of the right knee, grossly normal right patellar tracking, tenderness to palpation over the medial and lateral joint line and patella of the right knee, negative Drawer signs, and negative Lachman, Mc Murray, patellar grind, varus stress, and valgus stress tests. Dr. Sciaroni stated an impression of right knee lateral meniscus tear post-surgery, right knee patellar chondromalacia, resolved right knee lateral collateral ligament sprain, mild right patellar tendinosis, nonindustrial osteochondroma of the right proximal tibia, and a resolved left knee contusion. She opined that the right lateral meniscus tear and right patellar chondromalacia had not resolved. Dr. Sciaroni noted that the mild degeneration of the lateral meniscus without focal tear was a “common description of post-surgical findings” and was consistent with his history of lateral meniscal tear and arthroscopic repair. She explained that degenerative findings in appellant’s right knee consistent with chondromalacia had not reached the severity of degeneration that would be described as arthritis and “[t]herefore, the diagnosis of right knee osteoarthritis is not supported.” Dr. Sciaroni opined that the mild patellar tendinosis of the right knee remained employment related and had become “persistent based on the chronicity of the patellofemoral and lateral meniscus problem.” She opined that the osseous excrescence was a nonindustrial osteochondroma, a common, benign growth commonly observed as an incidental finding on imaging studies and was not clinically significant or related to trauma. Dr. Sciaroni opined that appellant would require continued treatment and was “at risk for development of post-traumatic arthritis due to the injury. He already has mild degeneration as evidenced by his lateral meniscal findings and his patellofemoral joint findings.” She noted work restrictions.

By decision dated March 24, 2021, OWCP expanded its acceptance of the claim to include patellar tendinitis of the right knee. It further found that the accepted right lateral collateral ligament sprain and left knee contusion had resolved, based on Dr. Sciaroni’s opinion as the weight of the medical evidence.

By second decision also dated March 24, 2021, OWCP denied expansion of the acceptance of the claim to include right knee arthritis and an osseous excrescence emanating from the posterior aspect of the right proximal tibia. It further found that the mild degeneration of the lateral meniscus without a focal tear was a common description for post-surgical findings and was consistent with the meniscal tear previously accepted in the claim. OWCP accorded Dr. Sciaroni’s opinion the weight of the medical evidence.

On April 5, 2021 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP’s Branch of Hearings and Review, held on July 6, 2021.

By decision dated August 20, 2021, the OWCP hearing representative affirmed the March 24, 2021 decision, which denied expansion of the acceptance of the claim to include right knee arthritis and the nine mm osseous excrescence.

LEGAL PRECEDENT

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.⁸

Causal relationship is a medical question that requires medical opinion evidence to resolve the issue.⁹ 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.¹⁰

To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence.¹¹ 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.¹² The weight of medical evidence is 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.¹³

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.¹⁴

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP

⁸ *S.M.*, Docket No. 20-1527 (issued March 29, 2022); *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).

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *Id.*

¹¹ *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹² *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).

¹³ *See P.M.*, Docket No. 18-0287 (issued October 11, 2018).

¹⁴ *D.B., supra* note 8; *see V.K.*, Docket No. 19-0422 (issued June 10, 2020).

shall appoint a third physician (known as a referee physician or impartial medical examiner, IME) who shall make an examination.¹⁵ 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.¹⁶ When there exist opposing medical reports of virtually equal weight and rationale and the 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

ANALYSIS

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

In support of his request for claim expansion to include right knee arthritis and an osseous excrescence emanating from the posterior aspect of the proximal tibia, appellant submitted a January 20, 2009 report by Dr. Lombardo diagnosing arthritis of the right lower leg. Appellant also provided a May 21, 2019 report by Dr. Chen, who opined that appellant had inflammation of the right knee as evidenced by mild effusion and warmth. He explained that the partial meniscectomy removed the cushioning effect of the cartilage and thereby predisposed appellant to premature osteoarthritis of the right knee. Additionally, appellant submitted Dr. Hirschbein's May 25, 2019 MRI scan, which noted appellant's history of right knee surgery with restricted motion and pain. Dr. Hirschbein diagnosed an osteochondroma of the posterior aspect of the proximal tibia.

In an October 1, 2020 report, Dr. Sciaroni, the second opinion physician, opined that degenerative right knee findings were not severe enough to be classified as arthritis, but that the employment injury put him at risk for development of post-traumatic arthritis. She opined that the osseous excrescence was an incidental finding not related to the accepted injury or surgery.

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an IME who shall make an examination.¹⁸ The Board finds that a conflict exists between appellant's physicians, Drs. Chen, Hirschbein, and Lombardo, and the second opinion physician, Dr. Sciaroni, regarding whether the acceptance of the claim should be expanded to include right knee arthritis and the tibial osteochondroma.

Therefore, the case must be remanded to OWCP for referral of appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).¹⁹

¹⁵ 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

¹⁶ 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

¹⁷ *R.H.*, Docket No. 21-0493 (issued March 4, 2022); *R.R.*, *supra* note 8; *see Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁸ *A.R.*, Docket No. 19-1204 (issued February 25, 2021); *see S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.S.*, Docket No. 19-0731 (issued August 22, 2019).

¹⁹ *R.H.*, *supra* note 17; *A.R., id.*; *S.M.*, Docket No. 19-0397 (issued August 7, 2019).

After this and other such further development as OWCP deems necessary, it 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 August 20, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further proceedings consistent with this decision of the Board.

Issued: September 2, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board