United States Department of Labor
Employees' Compensation Appeals Board

O.R., Appellant	)	
and	)	**Docket No. 23-0157**
	)	**Issued: July 25, 2023**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Miami, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 17, 2020 appellant filed a timely appeal from an August 5, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include a right quadriceps or right knee condition causally related to, or as a consequence of, his accepted employment injury.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances of the case as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On May 12, 2017 appellant, then a 34-year-old former transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 2013 he aggravated a prior lumbar condition when dragging luggage while in the performance of duty. OWCP assigned OWCP File No. xxxxxx403 and accepted it for an aggravation of a herniated disc at L5-S1. On April 1, 2017 appellant underwent a right inferior L5 hemilaminectomy, a right S1 anterior hemilaminectomy and foraminotomy, a partial facetectomy at L5, lysis of adhesions, and excision of an L5-S1 disc herniation.[3]

By decision dated July 7, 2017, OWCP denied appellant's traumatic injury claim as he had not factually established the occurrence of the alleged employment injury.

By decision dated September 18, 2017, OWCP modified the July 7, 2017 decision, on its own motion, to find that appellant had established that the May 14, 2013 employment incident occurred as alleged; however, it further found that he had not established a diagnosed condition causally related to the accepted May 14, 2013 employment injury.

On October 17, 2017 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 26, 2018, OWCP's hearing representative vacated the September 18, 2017 decision and accepted the claim for an aggravation of a herniated disc at L5-S1. He further found that the evidence was sufficient to require further development of the issue of whether appellant sustained a right lower extremity condition, in particular a knee condition, caused or aggravated by his April 22, 2013 and/or May 13, 2013 employment injuries and resultant surgery. OWCP's hearing representative referenced medical evidence contained in OWCP File No. xxxxxx033.

On February 8, 2018 OWCP advised appellant that it had accepted his claim for an aggravation of an L5-S1 herniated lumbar disc.

On March 29, 2018 OWCP referred appellant to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion examination on the issue of whether appellant sustained

[2] *Order Remanding Case*, Docket No. 18-1583 (issued September 17, 2019); *Order Remanding Case*, Docket No. 20-0506 (issued June 23, 2020); *and Order Dismissing Appeal*, Docket No. 20-0533 (issued June 23, 2020).

[3] Appellant has a previously-accepted claim for a lumbar sprain and a herniated disc at L5-S1 on April 22, 2013. On May 22, 2017 appellant filed a Form CA-1 alleging that he injured his right knee on August 6, 2014 when performing lunges as part of a physical therapy/work conditioning program while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx404. Appellant also has a claim for a December 9, 2014 traumatic injury under OWCP File No. xxxxxx125 and an occupational disease claim for an emotional condition under OWCP File No. xxxxxx667. Appellant's claims have been administratively combined, with xxxxxx033 serving as the master file.

a right knee condition causally related to or as a consequence of his April 22 or May 14, 2013 employment injuries.

In a report dated April 18, 2018, Dr. Bush provided his review of the medical evidence. He noted that it appeared that appellant had sustained an initial injury on April 22, 2013 and an aggravation of that injury on May 14, 2013. Dr. Bush related that appellant's right knee pain began in August 2014 while he performed work hardening exercises. On examination of the spine, he found a negative straight leg raise with full range of motion and no spasm or crepitus. Dr. Bush further found normal alignment of the lower extremities without atrophy of the quadriceps or calves or sensory deficits. He diagnosed an apparent disc herniation and radiculopathy at L5-S1 due to the April 22, 2013 employment injury, status post laminectomy and discectomy, and internal derangement of the right knee including a femoral trochlear chondral defect and a ruptured popliteal cyst. Dr. Bush noted appellant's belief that his back injury and right knee condition were related. He disagreed with his attending physician's October 5, 2015 finding that he had right quadriceps atrophy due to altered gait mechanics resulting from the injury to his lumbar spine. Dr. Bush noted that the nerves affected by appellant's employment injury were the right L5 and S1 nerve roots, which did not innervate the quadriceps muscle. He further noted that he had not found quadriceps atrophy on examination and found that the medical evidence failed to support a gait abnormality. Dr. Bush noted that appellant had not informed his employer that work activities injured his knee. He advised that diagnostic studies showed anatomical pathology of the knee. Dr. Bush opined that there was no causal relationship between appellant's right knee symptoms and his April 22, 2013 employment injury.

By decision dated May 16, 2018, OWCP denied appellant's claim for a consequential right knee condition.

Appellant appealed to the Board.

In a report dated August 21, 2019, Dr. Jesse Z. Shaw, an osteopath, evaluated appellant for pain in his bilateral thighs and noted that he described an injury performing physical therapy. He diagnosed left hip and right thigh pain, and a strain of the muscles, fascia, and tendons of the left thigh. Dr. Shaw noted that when squatting, appellant's right knee was higher than his left knee. He attributed appellant's symptoms of right quadriceps atrophy to his lumbar spine injury, and referenced an October 26, 2015 report. Dr. Shaw advised that appellant's joint effusion and ruptured popliteal cyst demonstrated on diagnostic studies were due to exercises he performed in physical therapy around August 6, 2014 and "to other work[-]related factors." He noted that appellant was not able to walk or put pressure on his right leg for a year after surgery due to swelling, and thus developed a strength imbalance rendering the right lower extremity prone to injury. Dr. Shaw also advised that appellant asserted that kneeling and squatting at work worsened his right knee condition.

In an order dated September 17, 2019, the Board set aside OWCP's May 16, 2018 decision and remanded the case for OWCP to administratively combine OWCP File Nos. xxxxxx033, xxxxxx403, and xxxxxx404 and thereafter issue a *de novo* decision.[4] The Board found that OWCP, in its January 26, 2018 decision, and Dr. Bush, the OWCP referral physician, had referenced

[4] *Supra* note 2.

evidence not contained in the current file number. The Board further indicated that appellant had filed a claim for a traumatic injury on August 6, 2014 to his right knee while performing lunges in physical therapy under OWCP File No. xxxxxx404. The Board remanded the case for OWCP to administratively combine OWCP File Nos. xxxxxx033, xxxxxx403, and xxxxxx404 and thereafter issue a *de novo* decision.

Subsequently, OWCP received an unsigned March 7, 2015 impairment evaluation from Dr. Stephen S. Wender, a Board-certified orthopedic surgeon, who determined that appellant had 10 percent whole person impairment due to his back condition. On examination, he found three-eighths of an inch of atrophy on the right versus the left lower extremity.

In a report dated April 5, 2016, Dr. Samy F. Bishai, an orthopedic surgeon, described appellant's complaints of back pain, weakness and atrophy of the right quadriceps, pain and swelling in the right knee joint, calf swelling, and right leg radiculopathy. He recounted appellant's history of employment injuries on April 22 and May 14, 2013 treated with surgery on April 1, 2014. On examination, Dr. Bishai found right knee tenderness and some "wasting or atrophy of the vastus medialis of the quadriceps muscle group of the right knee." For the right lower extremity, he diagnosed slight atrophy of the vastus medialis of the right knee joint and to rule out internal derangement. Dr. Bishai opined that "the vastus medialis atrophy is not related to a primary pathology in the right knee joint but is rather related to his back condition." He attributed it to the May 14, 2013 employment injury rather than the initial April 22, 2013 injury.

By decision dated December 30, 2019, OWCP denied appellant's request to expand his claim to include a right knee condition causally related to his accepted herniated L5-S1 lumbar disc injury.

On January 6, 2020 appellant appealed to the Board. The Clerk of the Appellate Boards assigned Docket No. 20-0506.[5]

By order dated June 23, 2020, the Board set aside the December 30, 2019 OWCP decision and remanded the case for OWCP to administratively combine OWCP File Nos. xxxxxx033, xxxxxx403, xxxxxx404, and xxxxxx125, followed by a *de novo* decision.

OWCP thereafter administratively combined appellant's claims. The relevant medical evidence received in appellant's other claim files, included a magnetic resonance imaging (MRI) scan of the right knee, obtained on April 23, 2015, revealed joint effusion and a 1.2-centimeter defect in the trochlea.

In an undated note, Dr. Shaw recounted appellant's history of an April 22, 2013 injury to his back lifting luggage at work with symptoms of right radiculopathy. He underwent a lumbar

[5] While the appeal in Docket No. 20-0506 was pending, OWCP issued a January 7, 2020 decision correcting the December 30, 2019 decision denying appellant's request to expand his claim to include a right knee condition due to his herniated L5-S1 lumbar disc. Appellant appealed the January 7, 2020 decision to the Board. By order dated June 23, 2020, the Board declared the January 7, 2020 OWCP decision null and void and dismissed appellant's appeal in Docket No. 20-0533, as there was no final adverse decision over which the Board could take jurisdiction. The Board explained that the January 7, 2020 decision involved the same issue that was already on appeal in Docket No. 20-0506.

laminectomy and discectomy on April 12, 2014. Appellant complained of pain in his right knee and leg spasms while undergoing physical therapy. On examination, Dr. Shaw found weakness of the quadriceps and tenderness of the right thigh. He diagnosed right quadriceps muscle weakness and atrophy, right knee effusion, and a defect of the trochlea of the right knee cartilage. Dr. Shaw attributed the right quadriceps atrophy to "the injury to his lumbar spine which led to non-physiological altered gait mechanics thus leading to pathologic knee symptoms." He found that appellant's symptoms resulted from the April 22, 2013 injury to his lumbar spine.

In a progress report dated October 5, 2015, Dr. Shaw discussed appellant's complaints of pain in the right thigh and knee. On examination, he found 4/5 strength in the left thigh with intact sensation, no swelling, and a normal gait. Dr. Shaw diagnosed unspecified right joint effusion, right muscle wasting and atrophy, and right muscle weakness. He related, "There is atrophy of the right quadricep leading to a non-physiological altered gait mechanics leading to pathological knee symptoms. I do believe [appellant's] symptoms are a result from a prior injury." Dr. Shaw provided similar progress reports on November 16, 2015 and February 15, 2016.

In a November 13, 2015 progress report, Dr. Jonathan A. Hyde, an orthopedic surgeon, found a normal examination of the right knee and lower leg. He diagnosed other intervertebral lumbar disc displacement. Dr. Hyde reviewed the April 23, 2015 MRI scan of the right knee. He noted that he had previously told appellant that his knee pain was "not a direct consequence of his herniated disc or the resultant spine surgery, considering he relates quadriceps atrophy which would be from the L4 nerve root which is not the case. As far as having a knee cartilage defect of the trochlea, the pathology would be more of a biomechanical problem that would directly cause pain to his knee, as well as cause quadriceps atrophy."

A March 31, 2016 MRI scan of the right knee revealed joint effusion with findings of a ruptured popliteal cyst and findings suggestive of a bone bruise without definite fracture.

In a report dated June 14, 2017, Dr. Bishai noted that in his report of April 5, 2016 he had attributed appellant's vastus medialis atrophy to a back condition from his May 14, 2013 employment injury rather than a pathology of the knee joint. He related that the May 14, 2013 injury had caused an aggravation of the original April 22, 2013 and the "development of radiculopathy due to compression of a nerve root in the back. It was my opinion that the atrophy to the vastus medialis is related to compression of a nerve root secondary to the back condition. I do not believe that it is directly related to his knee condition as a primary injury." Dr. Bishai advised that kneeling to check oversize bags may have contributed to appellant's right knee joint problems. He related that the MRI scan findings of joint effusion and a bone bruise "could have resulted from the type of work that he does…."

By decision dated August 5, 2020, OWCP denied appellant's request to expand his claim to include a right knee and right quadriceps condition causally related to his accepted employment injury.

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.[6]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[7] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[8] 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 employment injury.[9]

Section 8123(a) of FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[10]

ANALYSIS

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

OWCP referred appellant to Dr. Bush for a second opinion evaluation. In an April 18, 2018 report, Dr. Bush recounted appellant's history of employment injuries on April 13 and May 14, 2013 and reviewed the medical evidence of record. On examination, he found no atrophy of the quadriceps or calves, and no sensory deficit or misalignment of the lower extremities. Dr. Bush diagnosed an apparent disc herniation and radiculopathy at L5-S1 due to the April 22, 2013 employment injury, status post laminectomy and discectomy, and internal derangement of the right knee including femoral trochlear chondral defect and a ruptured popliteal cyst. He noted that appellant believed that his back injury and right knee condition were related. Dr. Bush disagreed that he had quadriceps atrophy and further found that the affected nerve roots of L5 and S1 on the right did not innervate the quadriceps muscle. He advised that medical evidence failed to support that appellant had a gait abnormality. Dr. Bush found that appellant's right knee symptoms were unrelated to the April 22, 2013 employment injury.

[6] *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[7] *W.N.*, Docket No. 21-0123 (issued December 29, 2021); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[8] *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *Id*.

[10] 5 U.S.C. § 8123(a); *see also* 20 C.F.R. § 10.321.

In an undated note, Dr. Shaw discussed appellant's history of an April 22, 2013 injury to his back, which was treated with an April 12, 2015 lumbar laminectomy and discectomy. On examination, he found weakness of the quadriceps and tenderness of the right thigh. Dr. Shaw diagnosed right quadriceps muscle weakness and atrophy, right knee effusion, and a defect of the trochlea of the right knee cartilage. He opined that appellant's back injury had caused an altered gait leading to right quadriceps atrophy to his lumbar spine injury, noting that it had caused an altered gait. Dr. Shaw attributed his symptoms to his April 22, 2013 lumbar injury. On October 5, 2015 Dr. Shaw found atrophy of the right quadricep causing an altered gait and knee symptoms due to a prior injury.

In a report dated April 5, 2016, Dr. Bishai found wasting or atrophy of the vastus medialis of the quadriceps muscle of the right knee. He discussed appellant's history of employment injuries on April 22 and May 14, 2013 and attributed the vastus medialis atrophy to appellant's May 14, 2013 injury to his back. On June 14, 2017 Dr. Bishai opined that appellant had vastus medialis atrophy due to his May 14, 2013 injury to his back. He advised that the May 14, 2013 injury had aggravated the initial injury of April 22, 2013 and resulted in nerve root compression causing radiculopathy.

The Board finds that a conflict in medical opinion exists between Drs. Shaw and Bishai, appellant's treating physicians, and Dr. Bush, the second opinion physician, regarding whether appellant sustained a right lower extremity condition causally related to his accepted employment injuries. Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[11] Consequently, the case must be remanded to OWCP to refer appellant to an impartial medical examiner to resolve the conflict in the medical opinion evidence regarding whether acceptance of appellant's claim should be expanded to include a right quadriceps or right knee condition due to an accepted employment injury. Following this and any 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.

[11] 5 U.S.C. § 8123(a); *M.M.*, Docket No. 20-0822 (issued August 2, 2022); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 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 25, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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