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

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| **K.A., Appellant** | ) | |
| **and** | ) | **Docket No. 17-0381** |
| | ) | **Issued: July 11, 2017** |
| **U.S. POSTAL SERVICE, PROCTOR STATION, Tacoma, WA, Employer** | ) | |

*Appearances:*
*Coby Jones*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On December 12, 2016 appellant, through her representative, filed a timely appeal from a June 17, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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] Appellant timely requested oral argument before the Board. By order dated April 11, 2017, the Board exercised its discretion and denied the request, finding that the issue presented could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0381 (issued April 11, 2017).

[3] 5 U.S.C. § 8101 *et seq.*

## ***ISSUE***

The issue is whether appellant sustained a bilateral knee condition causally related to factors of her federal employment.

## ***FACTUAL HISTORY***

On May 1, 2015 appellant, then a 50-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained disorders due to repeated trauma causally related to factors of her federal employment. She did not stop work. OWCP assigned the case file number xxxxxx521.

In an accompanying statement, appellant related that she injured both knees at work on May 15, 2013. On November 4, 2014 she resumed work after knee surgery, but her knees continued to hurt due to the requirements of her employment. Appellant described in detail her job duties.

OWCP had previously accepted under case file number xxxxxx011 that appellant sustained lumbar sprain and bilateral knee and leg sprains on May 15, 2013 when she was attacked by a dog while in the performance of duty. On September 16, 2014 Dr. David A. Coons, an attending osteopath and Board-certified orthopedic surgeon, performed partial medial and lateral meniscectomies with chondroplasties of both knees. Appellant stopped work on September 16, 2014 and resumed her usual job on November 3, 2014. OWCP had also accepted that she sustained a left ankle sprain and sacroiliac ligament sprain on January 29, 2015 under file number xxxxxx217.[4] Appellant worked six hours a day with restrictions following the injury.[5]

In support of her May 1, 2015 occupational disease claim, appellant submitted evidence relevant to her May 15, 2013 work injury under file number xxxxxx011. In an April 27, 2015 report, Dr. Coons diagnosed osteoarthritis of both knees aggravated by her work injury and employment activities.

In a report dated May 28, 2015, Dr. Mario G. Alinea, Board-certified in family practice, evaluated appellant for knee pain bilaterally and noted that she had a history of meniscal tears and degeneration. He advised that after knee surgery she continued to have symptoms that prevented her from performing her usual employment. Dr. Alinea diagnosed bilateral osteoarthritis of the knees aggravated by her employment injury and job duties. He recommended a right total knee replacement. Dr. Alinea related:

> "It is the orthopedic surgeon's opinion that the events and nature of [appellant's] job over the last 26 years as a letter carrier having to walk long distance, up and down hills, climbing up and down stairs and multiple work[-]related injuries to her knees are such that this is responsible for the aggravation [of] her knee, which

[4] OWCP combined the aforementioned files, with case file number xxxxxx011 serving as the master file.

[5] OWCP claim file number xxxxxx217 is not before the Board on the present appeal.

has led to a cascade of treatment and is now leading to a need for knee replacement."

By decision dated June 25, 2015, OWCP denied appellant's occupational disease claim. It found that the medical evidence was insufficient to show that she sustained a diagnosed condition as a result of the accepted employment factors.[6]

Appellant, on July 21, 2015, requested an oral hearing before an OWCP hearing representative. At the hearing, held on December 16, 2015, she related that her knees became worse when she returned to work.

By letter dated December 11, 2015, appellant attributed her knee condition to her job duties as a letter carrier for 26 years. She discussed her May 15, 2013 knee injuries and noted that after her September 16, 2014 surgery she returned to her usual duties in November 2014. Appellant's symptoms worsened due to additional work exposure and she began limping in April 2015. She described the job duties to which she attributed her bilateral knee condition.

In a report dated January 6, 2016, Dr. Coons diagnosed bilateral end-stage osteoarthritis of the knees. He noted that bilateral knee surgery on September 16, 2014 confirmed "complete loss of cartilage in both the right and left knees." Dr. Coons reviewed appellant's history of two nonemployment-related knee injuries, a torn left meniscus in August 2006 and a meniscus tear on September 23, 2007. Both injuries were treated with surgery that revealed preexisting degenerative changes. Appellant's knee problems increased and she underwent bilateral knee surgery on November 16, 2014, following which she resumed her usual work duties. Dr. Coons described her work duties as a letter carrier for 26 years, noting that she walked around 20,000 miles and entered and exited a vehicle hundreds of thousands of times. He related:

"My medical opinion is that work has certainly been a contributing factor to the development of the degenerative changes in her knees. This is especially true when we consider that [appellant] was only 41 years old when she had her first arthroscopy and was found to have some 'preexisting' degenerative changes. Arthritis typically develops over a period of time, and it is likely that she began having degenerative changes in her 30's. This time frame is not consistent with typical, age[-]related osteoarthritis. It is much more likely that overuse and overwork over long periods of time in [appellant's] occupation permanently accelerated and led to the degenerative changes, which were noted at such a young age. The biomechanical forces would be excessive cartilage pressure and micro-degeneration with recurrent and prolonged twisting, turning, squatting, and jumping impact, which are described inherent to her job. These mechanical forces were causative of any injury and inflammation cascade leading to the early

[6] OWCP noted that appellant underwent a second opinion examination in master file number xxxxxx011. In a report dated August 9, 2014, Dr. Justin Sherfey, an osteopath, diagnosed degenerative joint disease of the right knee with a progression of preexisting arthritis disease unrelated to the May 15, 2013 work injury an aggravation of right knee degenerative joint disease, a medial meniscus tear of the left knee due to the work injury, a temporary aggravation of preexisting degenerative joint disease due to the work injury, and a preexisting anterior cruciate ligament tear of the left knee.

degenerative changes on a more probable than not basis given the absence of predisposing injury or malformation."

Dr. Coons recommended bilateral total knee replacements due to appellant's end-stage osteoarthritis, which he found "permanently aggravated and accelerated by her occupation."

By decision dated February 17, 2016, OWCP's hearing representative vacated the June 25, 2015 decision. She found that Dr. Coons' January 6, 2016 report was sufficient to require further development of the evidence. The hearing representative instructed OWCP to refer appellant for a second opinion examination to determine whether she sustained a bilateral knee condition caused or aggravated by factors of her federal employment.

OWCP initially referred appellant to Dr. Louis Kretschmer, a Board-certified orthopedic surgeon, for a second opinion examination; however, it subsequently determined that his report and addendum should be excluded from the record.[7]

On May 17, 2016 OWCP referred appellant to Dr. Robert L. Kalb, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated June 2, 2016, Dr. Kalb noted that she experienced difficulties beginning in May 2013 after she hurt her knees and back during a dog attack. He related that he had reviewed and concurred with Dr. Kretschmer's reports. Dr. Kalb opined that appellant did not sustain arthritis of the bilateral knees due to any of her injuries. He further related, "The work requirements of standing, walking, and delivering the mail would not in and of themselves by direct cause, aggravation, precipitation, or acceleration lead to advanced arthritis with requirement for bilateral knee replacement." Dr. Kalb advised that appellant had no work restrictions as a result of her accepted injuries and that her current symptoms were "related to osteoarthritis in her knees, which is not an allowed or accepted [w]orkers' [c]ompensation condition."

By decision dated June 17, 2016, OWCP denied appellant's claim for a bilateral knee condition causally related to factors of her federal employment. It found that Dr. Kalb's opinion constituted the weight of the evidence and established that work duties did not cause or contribute to her bilateral knee osteoarthritis.

On appeal counsel contends that the opinion of Dr. Coons was rationalized and based on a detailed description of her work duties. He further asserts that Dr. Kalb failed to refer to appellant's work duties and appeared to find that OWCP did not allow bilateral osteoarthritis as an accepted condition.

[7] OWCP indicated that it was excluding Dr. Kretschmer's reports due to insufficient rationale as he based his opinion on literature rather than the facts of the case. Dr. Kretschmer's reports, however, do not fall within the category of reports which should be excluded from the record. There is no evidence that he performed fitness-for-duty examinations for the employing establishment, that OWCP had previously requested an impartial report and failed to seek clarification before seeking his opinion; that his reports were obtained through telephone contact, that OWCP improperly utilized leading questions, or that it involved surveillance video provided to a referee physician directly by the employing establishment. OWCP therefore was not required to exclude Dr. Kretschmer's reports from the record. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development and Evaluating Medical Evidence*, Chapter 2.810.12(a) (September 2010); *see also D.M.*, Docket No. 10-0857 (issued January 3, 2011). Any error in excluding the physicians' reports was harmless, however, as it does not affect the outcome of this case.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[8] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[9] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[10]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[11] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[12] and (3) medical evidence establishing the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[13]

Section 8123(a) provides that, 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.[14] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.[15]

## ***ANALYSIS***

Appellant attributed her bilateral knee condition to the performance of her work duties as a city carrier. OWCP accepted the occurrence of the claimed employment factors. The issue

[8] *Supra* note 3.

[9] *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[11] *Michael R. Shaffer*, 55 ECAB 386 (2004).

[12] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[13] *Beverly A. Spencer*, 55 ECAB 501 (2004).

[14] 5 U.S.C. § 8123(a).

[15] 20 C.F.R. § 10.321.

therefore is whether the medical evidence establishes a causal relationship between the claimed conditions and the identified employment factors.

In support of her occupational disease claim, appellant submitted a May 28, 2015 report from Dr. Alinea. Dr. Alinea diagnosed bilateral knee osteoarthritis aggravated by her work injury and job duties, noting that her orthopedic surgeon believed that extensive walking, climbing stairs, and repeated injuries caused an aggravation of a knee condition and the need for knee replacement.

Dr. Coons, in a January 6, 2016 report, discussed appellant's history of bilateral knee surgery on September 16, 2013 showing a total loss of cartilage in both knees. He noted that she had a history of meniscal tears not related to work in 2006 and 2007. Dr. Coons provided a description of appellant's employment duties for the past 26 years as a letter carrier, including walking about 20,000 miles and entering and exiting her vehicle hundreds of thousands of times over the course of her career. He diagnosed bilateral end-stage knee arthritis. Dr. Coons opined that work contributed to the degenerative changes in appellant's knees, particularly as her arthritis began when she was 41 years old and thus was not consistent with osteoarthritis resulting from age. He asserted that overuse due to her work duties accelerated and caused degeneration due to the biomechanical forces of "excessive cartilage pressure and micro-degeneration with recurrent and prolonged twisting, turning, squatting, and jumping impact, which are described inherent to her job." Dr. Coons opined that appellant required bilateral total knee replacements due to end-stage osteoarthritis aggravated and hastened by work duties.

OWCP referred appellant to Dr. Kalb for a second opinion examination. On June 2, 2016 Dr. Kalb discussed her history of a back and bilateral knee injury in May 2013. He found that appellant's bilateral knee arthritis was not related to either her history of injuries or her job duties. Dr. Kalb opined that standing, walking, and mail delivery were not activities that would cause, aggravate, or accelerate arthritis severe enough to require knee replacements.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence between appellant's physician, Dr. Coons and OWCP's referral physician, Dr. Kalb. As previously noted, when there is disagreement between an OWCP physician and the employee's physician, OWCP will appoint a third physician who shall make an examination.[16] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[17] The Board finds that the opinions of Dr. Coons and Dr. Kalb to be of virtually equal weight. Consequently, the case must be remanded for OWCP to prepare an updated statement of accepted facts and refer appellant to an appropriate impartial medical examiner for resolution of the conflict regarding whether she sustained a bilateral knee condition causally related to her employment duties. After such further development as deemed necessary, it shall issue a *de novo* decision.

[16] *See supra* notes 13-14.

[17] *See W.S.*, Docket No. 16-0111 (issued March 14, 2017).

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the June 17, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 11, 2017
Washington, DC

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

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

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