

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

_____)	
A.G., Appellant)	
)	
and)	Docket No. 21-0315
)	Issued: December 29, 2021
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Providence, RI,)	
Employer)	
_____)	

Appearances:
John L. DeGeneres, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 9, 2020 appellant, through counsel, filed a timely appeal from a November 25, 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 to consider 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 an 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.*

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include a left knee condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

On March 10, 2017 appellant, then a 64-year-old building equipment maintenance mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee osteoarthritis due to factors of his federal employment including prolonged standing, walking, squatting, kneeling, and lifting. He noted that he first became aware of his condition and its relationship to his federal employment on December 15, 2016.³

In support of his claim, appellant submitted medical evidence, including an October 27, 2015 operative note from Dr. Robert C. Marchand, a Board-certified orthopedic surgeon. Dr. Marchand noted preoperative and postoperative diagnoses of left knee osteoarthritis. He indicated that appellant underwent a left total knee replacement.

In a December 15, 2016 medical report, Dr. Byron V. Hartunian, an attending orthopedic surgeon, diagnosed status post right and left total knee replacements for end-stage degenerative arthritis. He opined that appellant's bilateral degenerative arthritis was permanently aggravated by his repetitive work activities and required a bilateral total knee replacement.

By decision dated August 18, 2017, OWCP denied appellant's occupational disease claim. It found that the medical evidence of record was insufficient to establish causal relationship between a diagnosed medical condition and the accepted factors of his federal employment.

Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated April 10, 2018, the hearing representative set aside the August 18, 2017 decision and remanded the case for further development of the evidence. She found that the December 15, 2016 opinion of Dr. Hartunian, while not fully rationalized, was sufficient to warrant further development of the medical evidence regarding causal relationship. The hearing representative also instructed that, on remand, OWCP should administratively combine the present claim with OWCP File No. xxxxxx495, and refer appellant for a second opinion examination to determine whether his April 6, 2000 employment injury and/or his accepted employment factors contributed to his bilateral knee osteoarthritis.⁴

On June 28, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Stanley Hom, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether his accepted employment factors caused or contributed to his preexisting bilateral knee osteoarthritis. In an initial report dated September 17, 2018, Dr. Hom diagnosed bilateral knee osteoarthritis, status

³ OWCP assigned the present claim OWCP File No. xxxxx162. Appellant has a prior claim under OWCP File No. xxxxx495 accepted for an April 6, 2000 right knee sprain.

⁴ On remand, OWCP administratively combined File No. xxxxxx495 with the present claim assigned File No. xxxxxx162, with the latter serving as the master file.

post April 28 and October 27, 2015 right and left knee total replacements, and right knee gastroc tear. He advised that appellant's right knee gastroc tear was related to his April 6, 2000 employment injury. Dr. Hom further advised that his employment activities were a minor contributing factor to the development of his bilateral knee osteoarthritis. He maintained that appellant's April 6, 2000 employment injury was unrelated to his bilateral osteoarthritis diagnosis. Dr. Hom determined that appellant had 21 percent permanent impairment of his left knee in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ In an accompanying work capacity evaluation (Form OWCP-5c) dated September 17, 2018, he indicated that appellant could perform his usual job without restrictions.

In a supplemental report dated October 22, 2018, Dr. Hom clarified his opinion on whether there was a causal relationship between appellant's accepted employment factors and bilateral knee osteoarthritis. He explained that appellant's bilateral knee condition would have progressed regardless of the work activities he performed at the employing establishment.

By decision dated November 21, 2018, OWCP denied appellant's occupational disease claim, finding that Dr. Hom's opinion constituted the weight of the medical evidence. Appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated February 25, 2019, the hearing representative set aside the November 21, 2018 decision and remanded the case for OWCP to further develop the evidence. She found that Dr. Hom's October 22, 2018 supplemental report was not entitled to the weight of the medical evidence as it was not based on an accurate account of appellant's job positions at the employing establishment. The hearing representative found that the case record did not contain descriptions of appellant's positions or a statement from the employing establishment regarding the physical requirements of his positions. She directed that OWCP obtain a supplemental report from Dr. Hom clearly explaining whether appellant's bilateral knee osteoarthritis was caused or contributed to by his work duties.

Official copies of appellant's position descriptions were thereafter obtained by OWCP. In a July 11, 2019 letter, Dr. Hom noted his review of appellant's position descriptions and opined that his bilateral knee osteoarthritis was not caused, aggravated, accelerated, precipitated, or contributed to by his employment duties. He reasoned that the duties of appellant's positions did involve chronic/repetitive squatting and kneeling activities. Occasional or intermittent squatting or kneeling (or a combination of both) would not be considered significant. Dr. Hom further reasoned that there were no documented episodes of knee osteoarthritis aggravation identified. He indicated that any reference to a temporary aggravation previously made was speculative on his part and discussed in his October 22, 2018 addendum report.

By decision dated July 25, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that appellant's bilateral osteoarthritis was causally related to the accepted employment factors. It accorded the weight of the medical evidence to Dr. Hom's July 11, 2019 addendum report.

⁵ A.M.A., *Guides* (6th ed. 2009).

On July 30, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.⁶

By decision dated September 11, 2019, the hearing representative found that a conflict in medical opinion existed between Dr. Hartunian, appellant's physician, and Dr. Hom, OWCP's second opinion physician, as to whether appellant's preexisting bilateral knee osteoarthritis was caused by the accepted factors of his employment. The hearing representative remanded the case for referral of appellant to an impartial medical specialist to resolve the outstanding conflict.

On remand, OWCP referred appellant, along with an updated SOAF, the medical record, and a series of questions, to Dr. Alan Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence.

In a November 20, 2019 report, Dr. Solomon, serving as the impartial medical examiner (IME), noted that appellant related his federal employment duties, and his review of the SOAF and medical record. On physical examination of the right knee, he reported asymptomatic post total right knee replacement, normal range of motion, a well-healed surgical wound, and no effusion, pain, or tenderness. On examination of both knees, Dr. Solomon found equal leg lengths and no antalgic limp. Appellant was able to perform 50 percent deep knee bending and walk without an assist. Genu varum measured less than 5 degrees. Hips and ankles showed normal symmetrical painless motion. Appellant weighed 245 pounds and his only complaint was that he was unable to run. Dr. Solomon opined that appellant suffered a permanent aggravation of his preexisting right knee osteoarthritis. He further opined, however, that there was no objective or subjective evidence of aggravation or progression of his preexisting left knee osteoarthritis that required the October 2015 total left knee replacement. Dr. Solomon indicated that it was not until September 2015 when Dr. Justin W. Kung, a Board-certified diagnostic radiologist, identified and reported medial bone on bone osteoarthritis, a "0 millimeter" medial joint space interval measurement. He related that it took 15 years from appellant's accepted 2000 work injury for the left knee to reach a similar state in 2015 while his right knee reached that same point of erosion/degradation point in 12 years. Dr. Solomon noted that it was appellant's decision to wait and undergo surgery on both knees in 2015. He determined, in accordance with the sixth edition of the A.M.A., *Guides*, that appellant had 21 percent permanent impairment of the right knee due to his total right knee replacement.

By decision dated January 9, 2020, OWCP accepted appellant's claim for permanent aggravation of right knee osteoarthritis based on the November 20, 2019 opinion of IME Dr. Solomon.

By decision dated January 16, 2020, OWCP denied expansion of the acceptance of appellant's claim to include left knee osteoarthritis. It found that the weight of the medical evidence rested with the November 20, 2019 report of Dr. Solomon, the IME, who opined that appellant's preexisting left knee osteoarthritis was not aggravated by his accepted employment factors.

⁶ On September 5, 2019 counsel also requested the issuance of a subpoena to Dr. Hom for his response to a set of questions regarding causal relationship.

On January 29, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.⁷

By decision dated May 27, 2020, OWCP's hearing representative affirmed the January 16, 2020 decision. She found that the medical opinion of Dr. Solomon, the IME, constituted the special weight of the medical evidence and established that appellant's accepted employment factors did not accelerate or aggravate his preexisting left knee osteoarthritis.⁸

On June 12, 2020 counsel, on behalf of appellant, requested reconsideration.

By decision dated July 2, 2020, OWCP denied modification of the May 27, 2020 decision, finding that Dr. Hom and Dr. Solomon provided sufficient rationale in support of their opinions that appellant's preexisting left knee osteoarthritis was not causally related to his accepted work factors.

On September 11, 2020 appellant, through counsel, requested reconsideration and submitted an August 24, 2020 letter from Dr. Robert W. Macht, a general surgeon. Dr. Macht reviewed the reports of Dr. Hom and Dr. Solomon, and disagreed with their opinion that appellant's left knee osteoarthritis was not related to his accepted employment factors. He explained that Dr. Hom's opinions on causation were speculative and lacked any credible medical rationalization. Based on his review of the medical records and appellant's history, Dr. Macht maintained that Dr. Hartunian's opinions on causation were supported by the scientific evidence, factual and medical background, and medical findings.

By decision dated November 25, 2020, OWCP denied modification of its July 2, 2020 decision.

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.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the accepted employment injury must be based on a complete factual and medical background.¹¹ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale,

⁷ By decision dated March 13, 2020, OWCP's hearing representative denied appellant's request to issue a subpoena, finding that he had not established that there was no other means by which the testimony could be obtained.

⁸ The hearing representative also found that subpoenas were not required to be issued because Dr. Solomon and Dr. Hom had provided sufficient medical rationale to support their opinions.

⁹ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

¹⁰ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.¹²

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 the employee, OWCP shall appoint a third physician (known as a referee physician or IME) who shall make an examination.¹³ 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.¹⁴ When there exists 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.¹⁵

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical opinion evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.¹⁶ If the IME fails to respond or does not provide an adequate response, it should refer appellant for a new impartial medical examination.¹⁷

ANALYSIS

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

OWCP properly determined that a conflict in medical opinion existed between Dr. Hartunian, appellant's treating physician, and Dr. Hom, OWCP's second opinion physician, on the issue of whether appellant sustained bilateral knee osteoarthritis causally related to his April 6, 2000 employment injury and accepted employment factors. Accordingly, it referred appellant to Dr. Solomon, serving as the IME, to resolve the conflict.¹⁸

In his November 20, 2019 report, Dr. Solomon reported essentially normal findings on examination of both knees with the exception of appellant's sole complaint that he was unable to run. He opined that appellant suffered permanent aggravation of his preexisting right knee osteoarthritis. Dr. Solomon further opined, however, that there was no objective or subjective

¹² *Id.*

¹³ 5 U.S.C. § 8123(a); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

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

¹⁵ *See R.R.*, *id.*; *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁶ *See J.K.*, Docket No. 21-0007 (issued July 30, 2021); *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *K.C.*, Docket No. 19-1251 (issued January 24, 2020).

¹⁷ *Id.* *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹⁸ *V.K.*, *supra* note 16; *G.B.*, Docket No. 19-1510 (issued February 12, 2020); *R.H.*, 59 ECAB 382 (2008).

evidence to establish that appellant's employment factors caused disability, aggravation, or progression of his preexisting left knee osteoarthritis resulting in his October 2015 total left knee replacement. He noted that the identification of appellant's medial bone on bone osteoarthritis was not made until September 2015 by Dr. King, it took 15 years from appellant's 2000 injury for the left knee to reach a similar state in 2015 while his right knee reached that same point of erosion/degradation point in 12 years, and it was appellant's decision to wait and undergo surgery on both knees in 2015. Dr. Solomon did not, however, specifically explain, with medical rationale, whether the accepted employment factors aggravated appellant's left knee osteoarthritis that necessitated surgery in October 2015. As the report of Dr. Solomon lacks sufficient medical rationale to carry the special weight of the medical evidence regarding whether appellant's left knee condition resulted from the accepted permanent aggravation of his right knee osteoarthritis, the Board finds that it is insufficient to resolve the conflict in the medical evidence.¹⁹

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²⁰ When it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his or her original report.²¹

On remand, OWCP shall obtain a supplemental report from Dr. Solomon sufficient to resolve the conflict regarding whether appellant's left knee condition is causally related to factors of his federal employment or occurred as a consequence of his accepted right knee condition. If Dr. Solomon is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP should refer appellant to a new IME for examination for the purpose of obtaining a rationalized medical opinion on the issue.²² Following this and any other further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁹ *S.M.*, Docket No. 21-0149 (issued June 21, 2021); *K.C.*, *supra* note 16; *A.R.*, Docket No. 12-0443 (issued October 9, 2012); *see also P.F.*, Docket No. 13-0728 (issued September 9, 2014).

²⁰ *See J.K.*, *supra* note 16; *S.M.*, *id.*; *C.S.*, Docket No. 20-0621 (issued December 22, 2020).

²¹ *Supra* note 16.

²² *J.K.*, *supra* note 16; *R.H.*, Docket No. 17-1903 (issued July 5, 2018); *J.W.*, Docket No. 15-0020 (issued August 17, 2016); *Harold Travis*, *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 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: December 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board