United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 20-0866**
	)	**Issued: February 26, 2021**
U.S. POSTAL SERVICE, POST OFFICE, San Juan, PR, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 9, 2020 appellant, through counsel, filed a timely appeal from a January 2, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 January 2, 2020 decision, OWCP received additional evidence. 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include osteoarthritis of the left knee causally related to his accepted June 23, 2011 employment injury; and (2) whether OWCP abused its discretion by denying appellant's request for authorization for total left knee arthroplasty.

FACTUAL HISTORY

On June 23, 2011 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained left knee bursitis and a left knee sprain when he stepped on an uneven floor and his left knee gave way while in the performance of duty. OWCP accepted the claim for a left medial meniscus tear.

On August 11, 2011 appellant underwent authorized left knee arthroscopy, performed by Dr. Pedro Tort-Saade, a Board-certified orthopedic surgeon.

On November 13, 2014 appellant underwent left knee arthroscopic partial meniscectomy of the left medial and lateral meniscus with microfracture procedure, performed by Dr. Tort-Saade. OWCP accepted recurrences of disability (Form CA-2a) and paid appellant wage-loss compensation.

On October 11, 2016 OWCP received an authorization request for proposed left knee replacement surgery from Dr. Tort-Saade.

In a January 8, 2017 report, Dr. Tort-Saade opined that left knee arthroscopic surgery and conservative treatment had not improved appellant's symptoms. On March 27, 2017 he performed a total left knee arthroplasty.

Dr. Tort-Saade opined in an April 20, 2017 report that the left knee arthroplasty was necessitated by end stage left knee osteoarthritis caused by severe cartilage damage secondary to the accepted 2011 employment injury. He explained that even if appellant had preexisting osteoarthritis or cartilage degeneration, these conditions were asymptomatic before the 2011 work injury.

On June 14, 2017 OWCP prepared a statement of accepted facts (SOAF) and referred it, together with the case record, to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), to determine the medical necessity of the requested surgery and whether the surgery was due to the accepted June 23, 2011 employment injury.

In a June 30, 2017 report, Dr. Fellars opined that the recommended total left knee arthroplasty had not been established or accepted as causally related to the June 2011 employment injury and, thus, it was not medically necessary. He explained that the requested surgery "is an acceptable treatment option for end-stage knee osteoarthritis and degenerative joint disease," but not for appellant's accepted employment-related conditions. Dr. Fellars added that appellant's claim would need to be "expanded for there to be a causal relationship between his accepted conditions and this surgical request."

On July 21, 2017 OWCP subsequently referred the case to Dr. Fellars for an opinion on whether acceptance of the claim should be expanded to include osteoarthritis of the left knee. In

a July 26, 2017 report, Dr. Fellars reviewed the reports of Dr. Tort-Saade. He reiterated his opinion that the advanced left knee arthritis was not causally related to the accepted employment injury. Dr. Fellars opined that appellant's preexisting osteoarthritis was idiopathic, and that its natural progression resulted in the left knee replacement.[4]

In an October 18, 2018 report, Dr. Miguel Berrios, a physiatrist, discussed his disagreement with Dr. Fellars' conclusions. He asserted that appellant sustained a work-related left knee injury that required two surgeries and accelerated preexisting osteoarthritis that had been totally benign, culminating in total left knee replacement surgery.

By decision dated December 7, 2018, OWCP denied expansion of the claim to include osteoarthritis, based on Dr. Fellars' opinion as the weight of the medical evidence.

On January 2, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On April 30, 2019 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of the injury-related conditions and the necessity of the requested left knee arthroplasty.

Dr. Rojas submitted a May 17, 2019 report reviewing the medical record and SOAF. He noted appellant's complaints of pain in the replaced left knee, and further noted that he ambulated with a cane, favoring his left knee. On examination of the left knee, Dr. Rojas observed a positive anterior Drawer's sign with moderate effusion. He opined that the 2011 employment injury caused only the torn left medial meniscus, which had been removed during the left knee arthroplasty. Dr. Rojas opined that the left knee osteoarthritis was unrelated to the accepted injury. He indicated that appellant had attained maximum medical improvement (MMI) in February 2017 when he underwent total left knee replacement.

By decision dated June 19, 2019, OWCP denied expansion of the claim to include left lower extremity osteoarthritis as the medical evidence of record did not establish that the diagnosed arthritis was causally related to the accepted employment injury.

By separate decision dated June 19, 2019, OWCP denied authorization of the total left knee arthroplasty, which appellant underwent on March 27, 2017, finding it was not medically necessary for a condition causally related to the June 23, 2011 employment injury or a consequential condition.

On June 26, 2019 appellant, through counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, held October 16, 2019. During the hearing, counsel contended that the accepted employment injury accelerated and precipitated left knee osteoarthritis, necessitating the requested left knee arthroplasty. Counsel contended that Dr. Rojas supported causal relationship as he noted that the osteoarthritis developed only after the

[4] Dr. Fellars provided December 5 and 28, 2017 and January 9, 2018 reports reiterating that the accepted injury had not resulted in osteoarthritis of the left knee and that the requested left knee arthroplasty was not necessitated by the accepted injury.

accepted meniscal tear. Appellant testified that he had no left knee problems prior to the June 23, 2011 employment injury, and that he had returned to full duty following his surgeries.

By decision dated January 2, 2020, OWCP's hearing representative affirmed OWCP's June 19, 2019 decisions, finding that Dr. Rojas' opinion was sufficiently detailed and rationalized to represent the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

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.[5]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[6] 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.[7] 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.[8]

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.[9] The implementing regulation states 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.[10]

ANALYSIS -- ISSUE 1

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

OWCP accepted that appellant sustained a left meniscal tear. Dr. Tort-Saade explained in an April 20, 2017 report that the accepted meniscal tear aggravated and accelerated preexisting osteoarthritis of the left knee. By contrast, Dr. Rojas opined in a report dated May 17, 2019 that

[5] *See T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[6] *See S.A.*, Docket No. 18-0399 (issued October 16, 2018); *Kenneth R. Love*, 50 ECAB 276 (1999).

[7] *See P.M.*, Docket No. 18-0287 (issued October 11, 2018); *John W. Montoya*, 54 ECAB 306 (2003).

[8] *See H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

[9] 5 U.S.C. § 8123(a).

[10] 20 C.F.R. § 10.321; *see also S.N.*, Docket No. 19-1050 (issued July 31, 2020); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *Shirley L. Steib*, 46 ECAB 309 (1994).

appellant's left knee osteoarthritis was an idiopathic condition unrelated to the accepted meniscal tear and subsequent surgeries.

The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant developed additional conditions as a result of the accepted June 23, 2011 employment injury.[11] OWCP regulations provide 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.[12] The Board will therefore remand the case for OWCP to refer appellant to an impartial medical examiner, pursuant to 5 U.S.C. § 8123(a), to determine whether the acceptance of his claim should be expanded to include the additional condition of osteoarthritis of the left knee.[13] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 (a) of FECA[14] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[15] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in determining whether a particular type of treatment is likely to cure or give relief.[16] The only limitation on OWCP's authority is that of reasonableness.[17]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[18] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[19] In order for a surgical procedure to be authorized, appellant must establish that the procedure was for a condition causally related to the

[11] *See D.S.*, Docket No. 20-0146 (issued June 11, 2020); *W.B.*, Docket No. 17-1994 (issued June 8, 2018).

[12] 5 U.S.C. § 8123(a); *see also G.K.*, Docket No. 16-1119 (issued March 16, 2018).

[13] *See S.N.*, *supra* note 10; *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

[14] 5 U.S.C. § 8103(a).

[15] *Id*.; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

[16] *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

[17] *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

[18] *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

[19] *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L* , Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

employment injury and that the procedure was medically warranted.[20] Both of these criteria must be met in order for OWCP to authorize payment.[21]

Abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[22]

FECA provides that if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[23] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[24]

ANALYSIS -- ISSUE 2

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

OWCP accepted appellant's traumatic injury claim for a left medial meniscus tear and authorized an August 11, 2011 arthroscopic repair.

Appellant's treating physician, Dr. Tort-Saade, thereafter sought authorization for total left knee replacement. He explained in an April 20, 2017 report that appellant's end-stage osteoarthritis of the left knee was caused by severe cartilage damage sustained in the June 23, 2011 employment incident. Additionally, Dr. Berrios, a physiatrist, opined that the two arthroscopic procedures necessitated by the accepted meniscal tear accelerated appellant's preexisting osteoarthritis, necessitating total arthroplasty of the left knee.

In contrast, Dr. Rojas, OWCP's referral physician, indicated that the procedure was not necessitated by the accepted conditions as appellant's end-stage osteoarthritis of the left knee was unrelated to the accepted meniscal tear.

As Dr. Rojas, for the government, and Dr. Tort-Saade, appellant's attending physician, disagree on the issue of whether appellant's requested surgical procedure was for a condition causally related to an employment injury and is medically warranted, the Board finds that there is a conflict in the medical opinion evidence. The case must therefore be remanded for referral to an

[20] *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[21] *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

[22] *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

[23] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *Shirley L. Steib*, *supra* note 10.

[24] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

impartial medical examiner pursuant to 5 U.S.C. § 8123(a). Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 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: February 26, 2021
Washington, DC

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

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

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