United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant **and** **DEPARTMENT OF THE NAVY, NAVAL FACILITIES ENGINERING COMMAND STATIONS & BASES, Philadelphia, PA, Employer**	))))))))))	**Docket No. 09-898** **Issued: November 24, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 17, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated June 6 and December 4, 2008, denying his occupational disease claim. Pursuant to 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 establish that he sustained a left knee injury in the performance of duty.

On appeal, appellant's representative contends that the impartial medical examiner's report is speculative and requires clarification.

FACTUAL HISTORY

On October 5, 2007 appellant, a 60-year-old air conditioning equipment mechanic, filed an occupational disease claim alleging that he sustained a left knee condition due to employment activities. He stated that he developed left knee pain over a prolonged period of time, as a result of heating, ventilating and air conditioning work, which involved climbing ladders, crawling on the ground and rooftops and servicing air conditioning equipment.[1]

In a statement dated September 18, 2007, appellant noted that he had sustained a right knee injury in 1994 and had undergone right knee surgery in 1995. He alleged that he had developed left knee arthritis as a result of compensating for a right knee condition and now required bilateral knee surgery. Appellant stated that his duties as an air conditioning mechanic included installing, maintaining and repairing air conditioning and refrigeration systems. He was also required to, stoop, bend and reach in cramped spaces; climb ladders; and work on rooftops.

Appellant submitted April 13, 1998 notes from the employing establishment health unit, bearing an illegible signature. The notes reflected that he experienced left knee pain while kneeling.

Appellant submitted an April 24, 1998 report from Dr. Jonathan P. Garino, a Board-certified orthopedic surgeon, who stated that appellant had injured both knees three weeks prior, when he fell "on the job." An x-ray of the left knee revealed varus deformity and slight medial joint line narrowing. Dr. Garino stated that appellant was a candidate for high tibial osteomy on the left.

A May 13, 2006 report of a magnetic resonance imaging (MRI) scan of the left knee revealed a tear of the posterior horn of the medial meniscus and reflected an impression of degenerative changes, chondromalacia and medial meniscus tear.

Appellant submitted reports and notes from Dr. Garino from June 26, 2006 through November 5, 2007. On June 26, 2006 Dr. Garino stated that appellant was having difficulty with both knees. Range of motion (ROM) was 0 to 125 degrees bilaterally. He found no instability and mild medial joint tenderness bilaterally. On July 17, 2006 Dr. Garino indicated that, since appellant developed arthritis in his right knee in 1995, he had placed a significant strain on his left knee, which resulted in overuse and overload of the left knee and contributed significantly to the current degree of arthritis in the left knee.

On September 20, 2006 Dr. Garino diagnosed left-sided compensatory degenerative changes and arthritis. Examination of the left knee revealed good ROM (0 to 120 degrees), slight varus deformity and mild medial joint line tenderness, with slight effusion. Dr. Garino opined that appellant had developed significant arthritis in the left knee as a result of 10 years of compensating for his right knee. He stated that left knee surgery was required because appellant's comfort and function was deteriorating to the point where he might no longer be able

[1] Appellant's April 18, 1994 claim (File No. xxxxxx371) was accepted for right knee osteoarthritis and right knee sprain. He had arthroscopic surgery on the right knee on May 16, 1994 and a tibialostomy on April 12, 1995.

to perform the duties of his job. On August 27, 2007 Dr. Garino diagnosed advanced arthritis in both knees, as reflected in x-rays and recommended bilateral knee replacement surgery.

The record contains a March 2, 2007 report from the district medical adviser (DMA) in File No. xxxxxx371. The DMA stated:

> "It is not an accepted fact that the left knee would be expected to develop osteoarthritis because of osteoarthritis on the right. There is every reason to believe that normal usage could have resulted in the progressive left knee osteoarthritis."

The record contains a statement of accepted facts (SOAF) in File No. xxxxxx371, which reflected that appellant underwent bilateral knee arthroplasties on October 17, 2007. The right knee arthroplasty was authorized by the Office.

On November 16, 2007 the Office again forwarded the case file to the DMA for review and an opinion as to whether appellant's left knee condition could have developed as a result of his accepted right knee arthritis and, if so, whether left knee surgery was warranted. In a November 16, 2007 report, the DMA opined that appellant's left knee condition was not work related and was not caused by the effects of his right knee injury. He noted that appellant had not experienced an acute left knee injury. Rather, appellant's left knee condition seemed to be a natural progression of left knee osteoarthritis expected under normal conditions and normal usage and was not due to overuse because of right knee pain. The DMA indicated that appellant's left knee would have "worn out" regardless of the condition of his right knee and whether or not he was working, as the left knee had severe and inherent osteoarthritic disease.

On January 8, 2008 the Office informed appellant that the evidence submitted was insufficient to establish his claim. It advised him to provide a medical report explaining the factors of employment claimed to have caused his left knee condition, as opposed to age-related wear and tear.

In a decision dated February 12, 2008, the Office denied appellant's claim on the grounds that the medical evidence failed to demonstrate that his left knee condition was causally related to established work-related events.

On March 3, 2008 appellant requested reconsideration. In support of his request, he submitted a February 19, 2008 report from Dr. Garino, who stated that appellant had experienced a significant increase in pressure on his left knee due to heavy work, which included climbing stairs while carrying equipment. Dr. Garino also opined that his right knee injury led to the early development of osteoarthritis and the need for surgery of the left knee.

By decision dated June 6, 2008, the Office denied modification of its February 12, 2008 decision. On September 15, 2008 appellant again requested reconsideration.

In a report dated August 24, 2008, Dr. Garino opined that appellant's left knee condition was a result both of conditions of employment and his accepted right knee injury. He stated that appellant's job duties, which involved installing, maintaining and repairing shipboard air conditioners, positioning compressors, motors and other components aboard ships and lifting

objects weighing up to 50 pounds, contributed to his left knee arthritis. Dr. Garino explained that the surgical procedure that was performed on appellant's right knee created a knock-knee deformity, which overloaded the outside part of the knee. Because he was forced to compensate for 10 years for his abnormal right knee function by placing excessive stress on his left knee, appellant reportedly developed significant arthritis in the left knee.

The Office forwarded Dr. Garino's August 24, 2008 report, together with a SOAF, to the DMA for review and an opinion as to whether appellant's left knee condition was work related. In a September 29, 2008 report, the DMA concluded that appellant's left knee arthritis was not causally related to factors of employment and that it would have progressed whether or not appellant continued to work. He stated that there was no evidence that the right knee arthritis resulted in increased pressure and difficulty in the left knee. The DMA noted that a high tibial osteotomy does not change the biomechanics of the left knee significantly enough to influence the progression of arthritis in the opposite knee.

The Office found a conflict in medical opinion between Dr. Garino and the DMA. It referred appellant, together with a statement of accepted facts and the medical record, to Dr. Herbert Stein, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion as to whether appellant's left knee condition resulted either from his employment activities or the effects of his accepted right knee condition.

In a report dated November 12, 2008, Dr. Stein diagnosed status post total knee joint replacements bilaterally; varus deformity of the knees; and obesity. On examination, appellant was unable to squat more than approximately 30 degrees of knee flexion without pain. He had 15 degrees of flexion contracture of the right knee and 20 degrees on the left. Dr. Stein found some crepitus in the patellofemoral joint on ROM. There was mild laxity of the cruciates and no significant joint effusion in either knee. On the left knee, there was some tenderness in the anterolateral aspect of the tibiofemoral joint. On the issue of whether appellant's left knee condition was causally related to his job duties, Dr. Stein stated, "With the combination and the kind of work he was performing, one might expect progressive onset of osteoarthritis in the left knee as well as the right knee." He also stated, "With deformities of [appellant's] knees and his weight, his activities in itself (sic) would cause increasing degenerative changes in both knees." As to whether appellant's left knee arthritis was a consequence of his right knee condition, Dr. Stein stated that he suspected some increased stress on the left knee when climbing stairs one over one; however, he indicated that normal walking activities or even work walking would increase the stress on the left knee. He stated, "I would therefore have to tend to agree with [the DMA's] opinion that [appellant] would have come to total knee replacement on the left regardless of the injury on the right knee." Dr. Stein noted that, as appellant had not sustained a traumatic injury to the left knee, he was unable to specifically relate an injury to the right knee to advanced osteoarthritis of the left knee.

By decision dated December 4, 2008, the Office denied modification of its prior decisions. It found that Dr. Stein's referee report, which was well reasoned and based on a proper factual and medical background, represented the weight of the medical evidence.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that 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. The evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.[5]

Section 8123 of the Act 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.[6] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Id*.

[6] 5 U.S.C. § 8123.

sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[8] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[9]

ANALYSIS

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion. The Office found a conflict in medical opinion between Dr. Garino, who opined that appellant's left knee condition resulted both from his employment activities and the effects of his accepted right knee condition, and the DMA, who concluded that the left knee arthritis was not causally related to the right knee arthritis or to other factors of employment. It properly referred appellant to an impartial medical examiner in order to resolve the conflict. Dr. Stein's report, however, is insufficient to resolve the conflict, as it is vague and speculative, contains inadequate rationale and is inherently inconsistent. Therefore, the case must be remanded to the Office for further development of the medical evidence.

The Office asked Dr. Stein to provide an opinion as to whether appellant's diagnosed left knee arthritis was causally related to either his work activities or his accepted right knee condition. Dr. Stein discussed possible explanations for appellant's left knee condition; however, he did not provide a definitive opinion on either issue presented. His statement that one might expect progressive onset of osteoarthritis in the left knee as well as the right knee, based on the combination and the kind of work he was performing, was equivocal and unsupported by rationale. It is unclear from this statement whether Dr. Stein was supporting or refuting a causal relationship between job duties and the left knee condition. The probative value of Dr. Stein's report is further diminished by internal inconsistencies. At one point he stated that he would tend to agree with the DMA's opinion that appellant would have developed his left knee condition and the need for knee replacement surgery regardless of the right knee injury. At another point, Dr. Stein suspected some increased stress on the left knee when climbing stairs one over one and indicated that normal walking activities or even "work walking," would

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[7] *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Bernadine P. Taylor,* 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[8] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.,* 39 ECAB 736 (1988).

[9] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

increase the stress on the left knee. The Board notes that Dr. Stein's opinions were not expressed to a reasonable medical certainty and were not supported by medical rationale. Although he listed examination findings, he did not explain how they supported his opinions. Dr. Stein stated that, as appellant had not sustained a traumatic injury to the left knee, he was unable to specifically relate an injury to the right knee to advanced osteoarthritis of the left knee. He did not explain, however, why the absence of a traumatic injury to the left knee precluded the possibility of development of osteoarthritis to the left knee resulting from a right knee injury. As Dr. Stein's report is not sufficiently rationalized, it is of diminished probative value.[10]

The Office referred appellant to Dr. Stein for the specific purpose of resolving the conflict in medical evidence. For reasons stated above, the Board finds that Dr. Stein's report is insufficient to resolve the conflict. As Dr. Stein's opinion required clarification and elaboration, the Office was required to obtain a supplemental report from him to correct the defect in his original report.[11] The Office failed to do so. Therefore, the case will be remanded to the Office for a supplemental opinion from Dr. Stein. If Dr. Stein is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.[12] After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that this case is not in posture for a decision, as there exists an unresolved conflict in the medical opinion evidence as to whether appellant sustained a left knee injury in the performance of duty.

[10] *Willa M. Frazier*, 55 ECAB 379 (medical conclusions unsupported by rationale are of limited probative value on the issue of causal relationship). The Board notes that appellant's claim that he developed a consequential left knee condition as a result of his accepted right knee condition should be addressed under File No. xxxxxx371.

[11] *Supra* note 8;

[12] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 4 and June 6, 2008 are set aside and remanded for action consistent with the terms of this decision.

Issued: November 24, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board