

surgery and lateral medial meniscus debridement which was performed on November 18, 1994. On July 19, 1995 the Office authorized a second left knee arthroscopic surgery which was performed on September 11, 1995. Appellant stopped work on July 10, 1993 and was placed on the periodic rolls. He returned to light duty on April 17, 1995 and was placed on the short-term periodic rolls effective October 15, 1995. Appellant returned to light-duty work four hours per day on December 11, 1995 and full duty effective April 15, 1996. By letter dated February 4, 1997, he was again placed on the periodic rolls for temporary total disability.¹ Appellant returned to light-duty work on April 17, 1997.

On December 23, 2002 appellant filed a claim for a recurrence of disability beginning July 9, 2001. The Office subsequently received claims for compensation (Form CA-7) for intermittent periods of disability between January 3 to June 20, 2003 which the Office accepted. The Office denied appellant's claim for compensation for the period December 2, 2002 to January 2, 2003, finding his disability unrelated to his accepted injuries. By letter dated June 27, 2003, the Office placed appellant on the periodic rolls for temporary total disability.

In an August 12, 2004 report, Dr. Peter F. Sharkey, a treating Board-certified orthopedic surgeon, found that appellant sustained a consequential right knee injury. He explained that appellant put "extra stress on the right knee due to his left knee arthritis."

On October 31, 2004 the Office medical adviser opined that appellant did not sustain a consequential right knee injury.

On June 13, 2005 Dr. Robert Franklin Draper, Jr., a second opinion Board-certified orthopedic surgeon, opined that appellant did not sustain a consequential right knee injury. He noted:

"There is no specific injury to the right knee on the job. However, [appellant] did shift his weight from the left knee to the right knee and he feels that this caused him to develop some problem in the right knee. I am not able to confirm this, based upon my knowledge of orthopedic surgery. I believe the right knee complaints are not consequential to the injuries sustained on the job. [Appellant] does have some symptoms in the right knee and may very well have some arthritis in the right knee unrelated to the left knee injury."

On March 3, 2005 Dr. Sharkey reviewed the opinion of Dr. Draper and indicated his disagreement. He reiterated his opinion that appellant sustained a consequential right knee injury due to shifting his weight from the left knee. Dr. Sharkey stated that as a result of the left knee injury appellant "was unable to exercise and maintain a proper body weight." Appellant informed him that following his left knee injury "he was forced to put additional weight on his right knee in order to ambulate." Dr. Sharkey noted that appellant was morbidly obese and that "[o]besity is another risk factor for degenerative arthritis.

¹ On December 30, 1997 appellant filed a claim for a schedule award. By decision dated February 4, 1997, the Office issued appellant a schedule award for a 22 percent impairment of the left lower extremity.

The record reflects the Office requesting to bypass various physicians from being selected as impartial medical examiners. The physicians named in the bypass doctor request include, Dr. William D. Emper, Dr. Marc Manzione, Dr. Zachary B. Friedenberg, Dr. Paul Scoles, Dr. Roger Wong, Dr. Paul Reed Sweterutsch, Dr. Ronald B. Pitkow, Dr. Mark Nissenbaum and Dr. Robert Bachman, Board-certified orthopedic surgeons. The bypass notes for Dr. Emper were “(doctor is not available until mid-September). Moving on” and to remove because he was not taking any new clients. The Office requested removal of Dr. Manzione as required prepay only. The bypass note also noted “?(doctor) is not available until mid-September. Moving on.” In a second note the Office requested removal of Dr. Manzione as he was located too far away for examination. The Office requested removal of the remaining physicians for reasons such as no answer, not at the location indicated and the location was too far.

On July 27, 2005 the Office referred appellant to Dr. Emper to resolve the conflict in the medical opinion evidence found between Dr. Sharkey and Dr. Draper.

In a letter dated August 1, 2005 appellant’s counsel objected to the selection of Dr. Emper as the impartial medical examiner on the grounds that he “is not a fair minded examiner.” Appellant contended that there was no conflict in the medical evidence as Dr. Draper’s opinion failed to contain any supporting medical rationale.

In a report dated October 3, 2005, Dr. Emper reviewed the record, statement of accepted facts and set forth findings on physical examination. He noted that appellant did not sustain an employment-related left knee injury. Dr. Emper noted that appellant related complaints of right knee pain and “minimal symptoms of pain in the left knee.” A physical examination revealed “tenderness over the lateral joint line.” Dr. Emper concluded that there was “no evidence that the right knee problem is secondary to the injury to his left knee.” He opined that appellant’s weight of 266 pounds put him at increased risk for his right knee degenerative arthritis. Dr. Emper concluded that appellant’s weight “in and of itself is enough of a risk factor at his age” which “could cause the arthritic condition without causation from the left knee problem.” He opined that appellant was capable of working eight hours per day in a sedentary position.

By decision dated January 18, 2006, the Office denied appellant’s claim for a right knee consequential injury.

In a letter dated January 20, 2006, appellant’s counsel requested a review of the written record. He contended that the Office failed to follow proper procedures in selecting Dr. Emper as an impartial medical examiner.

By decision dated June 14, 2006, an Office hearing representative affirmed the denial of appellant’s claim that he sustained a consequential right knee injury. The Office hearing representative rejected appellant’s argument that the Office failed to follow the proper procedure in the selection of the impartial medical examiner.

LEGAL PRECEDENT

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause. Once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. However, a claimant bears the burden of proof to establish his claim for a consequential injury and as part of this burden, must present rationalized medical opinion evidence, based on a complete factual and medical background showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician.² Such opinion of the physician must be one of reasonable medical certainty and must be supported by medical reasoning explaining the nature of the relationship between the diagnosed condition and the employment.³

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part 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.⁴ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁵

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.⁶

The Office procedures further provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the

² *Charles W. Downey*, 54 ECAB 421, 422-23 (2003).

³ *Leslie C. Moore*, 52 ECAB 132, 134 (2000).

⁴ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB ____ (Docket No. 06-1676, issued December 26, 2006); *Darlene R. Kennedy*, 57 ECAB ____ (Docket No. 05-1284, issued February 10, 2006).

⁵ *Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005).

⁶ *Charles M. David*, 48 ECAB 543 (1997).

Physician's Directory System (PDS) should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.⁷

ANALYSIS

The Office accepted the claim for left knee sprain, left knee internal derangement and left knee popliteal cyst. On July 27, 2005 the Office referred appellant to Dr. Emper, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Sharkey, appellant's attending physician, and Dr. Draper, the second opinion medical specialist, regarding whether appellant sustained a consequential right knee injury.

Appellant contends that the Office did not follow proper procedures in scheduling the impartial medical examination. The Board finds that the record supports appellant's contention by virtue of several referral forms used by the Office. There are two notes from the PDS for Dr. Emper with notes to bypass. One reason noted for bypassing Dr. Emper was because he was not available until mid-September and the second reason was because he was not taking new patients. The record also contains two requests for bypass for Dr. Manzione. One bypass note mentioned that Dr. Manzione was not available until September and he required prepayment. The second bypass note requested removal of Dr. Manzione as he was too far. There is no evidence in the record explaining why Dr. Emper was selected as the impartial medical examiner following the two bypass requests from the PDS. The record does not contain any evidence regarding Dr. Manzione's address and why he was rejected for being too far. The Board finds that the lack of any explanation as to why Dr. Emper was selected in view of the two bypass notes by the Office supports appellant's contention that the Office failed to follow the correct procedure in selecting an impartial medical examiner. As the Office improperly selected Dr. Emper to resolve the conflict in the medical opinion evidence, there is an unresolved conflict.

CONCLUSION

The Board finds that there is an unresolved conflict in the medical opinion evidence as the Office failed to follow established procedures for selection of the impartial medical examiner. On remand, the Office should follow its procedures for selection of another impartial medical examiner to resolve the issue of whether appellant sustained a right knee condition as a consequence of the July 7, 1993 employment injuries. Following this and any further necessary development, the Office shall issue an appropriate merit decision.

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Miguel A. Muniz*, 54 ECAB 217 (2002); *Albert Cremato*, 50 ECAB 550 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2006 is set aside and the case remanded for further action consistent with the above opinion.

Issued: June 5, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board