

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

D.M., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
SAINT LAWRENCE SEAWAY
DEVELOPMENT CORPORATION,
Massena, NY, Employer**

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**Docket No. 08-20
Issued: July 2, 2008**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 1, 2007 appellant filed a timely appeal from an August 23, 2007 merit decision of the Office of Workers' Compensation Programs that denied her claim for recurrence of disability and a consequential emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that on May 18, 2006 she sustained a recurrence of disability causally related to her accepted employment injury; and (2) whether appellant met her burden of proof in establishing that she developed a consequential injury causally related to her accepted employment injury.

FACTUAL HISTORY

On August 28, 1997 appellant, then a 47-year-old laborer and relief line handler, filed a traumatic injury claim stating that she injured her right leg and knee on August 22, 1997 when a rope wrapped around her leg as she was helping to guide a ship into a lock. She stopped work on August 23, 1997 and returned to full duty on October 8, 1997. In a September 5, 1997 report, Dr. Manuel C. Palao, a Board-certified general surgeon, diagnosed “contusion abrasion (strangulation) of right lower extremity at knee level.” The Office accepted appellant’s claim for right knee medial meniscus tear.

On May 12, 2005 appellant stopped work and claimed a recurrence of disability. She stated that she had continuing numbness and pain around the same area as her original injury. Appellant was off work for eight days and returned to her regular job on June 19, 2005. She then stopped work until July 11, 2005, when she returned to a light-duty assignment. In a June 24, 2005 magnetic resonance imaging (MRI) scan report, Dr. Susanne Daye, a Board-certified diagnostic radiologist, diagnosed degenerative changes in the anterior and posterior horns of the medial meniscus, mild chondromalacia and early osteoarthritic changes at the patellofemoral joint. On June 27, 2005 Dr. Mark G. Stewart, a Board-certified orthopedic surgeon, noted appellant’s MRI scan results and opined that her knee condition was “directly related to the work injury to the right leg.” In a July 25, 2005 report, Dr. Bedros Bakirtzian, a Board-certified orthopedic surgeon, recommended that appellant undergo a right knee arthroscopy and noted that she could work light duty until the procedure. By decision dated September 27, 2005, the Office accepted appellant’s recurrence of disability claim and authorized surgery. On October 4, 2005 Dr. Bakirtzian performed a right knee arthroscopy with partial meniscectomy of the medial meniscus. In a December 7, 2005 note, Dr. Bakirtzian stated that appellant had returned to light-duty work on the switchboard and was “doing relatively well.”

In a January 11, 2006 report, Dr. Bakirtzian advised that appellant demonstrated mild tenderness and some altered sensation in her right leg. He noted that appellant complained that her light-duty assignment was “bothering her to some degree.” Dr. Bakirtzian diagnosed right leg paresthesias secondary to appellant’s employment injury and opined that she would “never be able to return to the type of work that she was doing prior to her accident.” He noted appellant’s work restrictions. On February 8, 2006 Dr. Bakirtzian noted that appellant complained of right knee pain when she tried to push herself off her seat. He explained that appellant was working as a receptionist and “she claims that this is bothering her as well.” Dr. Bakirtzian stated that appellant wished to retire and had “episodes of breaking down in tears” due to pain. He recommended that appellant continue her light-duty work at the switchboard. In a February 23, 2006 note, Dr. Bakirtzian stated that appellant reported that her work was very stressful and she felt unable to do her job. On April 4, 2006 he diagnosed right knee osteoarthritis and noted that appellant had recently had a functional capacity evaluation which placed her in the medium-lifting category, which was “not enough to allow her to go back to her regular work.” Dr. Bakirtzian also noted that appellant had increasing mild discomfort in her right knee. He stated that appellant was “basically disabled, unable to do the work that she was doing previously” and that she wished to retire. On April 6, 2006 Dr. Bakirtzian stated that appellant was unable to perform her date-of-injury job “working on the walls and on the locks” and would likely never return to that job.

In a May 8, 2006 telephone memorandum, the Office noted that the employing establishment advised that appellant was presently working full time in a light-duty capacity. However, the employing establishment noted that the light-duty assignment would expire soon and that no more work was available. The Office advised the employing establishment that appellant would “have to file a recurrence [of disability claim] when work has ceased.”

On May 18, 2006 appellant stopped work and filed a recurrence of disability claim. She explained that she had continuing pain in her right knee as she moved around the reception area and had begun to experience some symptoms in her left knee as well. In a May 18, 2006 disability certificate, Dr. Bakirtzian indicated that appellant could not work until approximately September 1, 2006. In a May 31, 2006 report, he diagnosed right knee osteoarthritis and noted that appellant was presently unable to work. In a June 19, 2006 MRI scan report, Dr. Mark Welch, a Board-certified diagnostic radiologist, diagnosed extensive tears in appellant’s left medial meniscus, along with degenerative changes.

In a June 21, 2006 statement, appellant asserted that her limited-duty position was a temporary assignment and the employing establishment no longer had work for her to do. She stated that she had continuing pain after returning to work, but continued to perform her limited-duty assignment until she found, on May 18, 2006, that she “just could n[o]t take it.” Appellant explained that on that day she moved toward the left side of her desk and experienced pain so severe that all she could do was cry. She also noted that her limited-duty job required her to move around frequently. Appellant stated that her condition had worsened since she returned to light duty.

By decision dated July 26, 2006, the Office denied appellant’s recurrence of disability claim finding that she did not meet her burden of proof in establishing a change in the nature and extent of her injury-related condition or of her light-duty job requirements.

By correspondence dated August 19, 2006, appellant requested an oral hearing.

On October 11, 2006 the Office referred appellant to Dr. Christopher Horn, a Board-certified orthopedic surgeon, for a second opinion concerning her current condition and ability to work in any capacity.

In an October 30, 2006 report, Dr. Horn noted appellant’s complaints of continuing right knee pain as well as depression that she had since her divorce. He diagnosed “early osteoarthritis, right knee; degenerative tear, meniscus, post meniscectomy; left knee complaints, degenerative change; chronic depression, by reports.” Dr. Horn noted that appellant’s depressive symptoms “may have some bearing on [her] subjective complaints.” He explained, however, that appellant’s knee symptoms were compatible with degenerative changes occurring over a period of time and unrelated to “a single episode,” and noted “a remarkably long interval between injury and seeking further advice.” Dr. Horn indicated that physical examination was compatible with degenerative changes in the left knee joint, which were unrelated to appellant’s right knee injury. He determined that appellant could return to work with restrictions but that her “prognosis for return to work ... is guarded, in view of the unrelated conditions and subjective complaints.”

By correspondence dated January 29, 2007, appellant's attorney asserted that Dr. Horn's report supported that appellant had a "consequential emotional condition that is impairing her ability to work."

In a January 10, 2007 report, Dr. Daniel Carr, a Board-certified orthopedic surgeon and a physician for appellant, diagnosed status postmedial meniscectomy and right knee arthritis. He explained that appellant's delayed recovery was due to her degenerative knee condition, which was attributable to "a combination of weight, age and post meniscectomy changes." Dr. Carr noted that appellant stopped work on May 18, 2006, claiming a recurrence of disability and did not intend to return to work. He stated that appellant had not yet reached maximum medical improvement but could work in a restricted capacity. Dr. Carr stated that appellant's employment injury caused "mild disability."

By correspondence dated April 19, 2007, the Office referred appellant to Dr. Howard Black, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict in the medical evidence the Office found between Dr. Bakirtzian and Dr. Horn, concerning appellant's disability due to her employment injury.

In progress notes prepared on May 2, 8 and 15 2007, Dr. Bakirtzian noted appellant's continuing complaints of right knee pain and diagnosed right knee osteoarthritis.

In a May 14, 2007 report, Dr. Black noted appellant's complaints of right and left knee pain, performed a physical examination and reviewed her medical history. He noted appellant's history of injury in 1997 and stated that she related that she "was having too much pain in both knees to be able to handle" her light-duty job, which required long periods of sitting and thus she "took disability retirement" in May 2006. Dr. Black noted that appellant had a left total knee replacement on February 6, 2007. He diagnosed severe medial compartment arthritis, status post contusion/abrasion and arthroscopic medial meniscectomy of the right knee and status post left total knee replacement for degenerative arthritis. Dr. Black concluded that appellant's medial compartment arthritis was related to her accepted medial meniscus tear, as it "represents a natural progression of the degenerative changes that were noted over the medial femoral condyle at the time of surgery on October 4, 2005." However, he stated that her left knee condition, which was caused by degenerative arthritis, was not work related. Dr. Black stated that appellant had reached maximum medical improvement and had permanent restrictions which would prevent her from returning to regular duty. However, he stated that appellant could perform sedentary work, either part time or full time, "if a suitable position could be found." Dr. Black also noted that appellant "does not appear to be depressed."

On May 31, 2007 appellant testified that she had ongoing knee pain which she believed was related to her original injury. She stated that she often had difficulty sleeping due to knee pain. When asked if this made her unhappy or irritable, appellant replied: "Yeah, it can but you know, I've dealt with it. I have, you get used to it." She explained that her light-duty receptionist job required her to move around and lift packages. Appellant's attorney asserted that she was required to lift packages of weights in excess of her lifting restrictions as set forth by Dr. Black. He also argued that the Office should refer appellant for a second opinion examination with a psychiatrist to determine whether she had a consequential emotional condition, based on Dr. Horn's statement that appellant seemed depressed.

In a June 26, 2007 statement, the employing establishment explained that appellant's light-duty assignment was sedentary and that the permanent incumbent of the position was wheelchair-bound and could not lift packages, hence lifting was not a job requirement. It also noted that Dr. Black's lifting restrictions were issued 11 months after appellant left her light-duty position. The employing establishment explained that the mail delivery clerk, not the receptionist, was responsible for moving boxes or packages when necessary. Also provided was a copy of a job description for a "management assistant," which noted that the receptionist's job included receiving and directing calls and visitors, providing control of vehicle keys, credit cards and bridge passes and keeping a "log of use." The position description noted "no special physical demands; may require stooping, reaching, occasional lifting and carrying of packages, supplies, etc."

Following the hearing, appellant submitted an October 6, 2006 report from Dr. Brett T. Hartman, a psychiatrist, who diagnosed mild to moderate major depressive disorder. Dr. Hartman explained that appellant had depression since the early 1990s, when she discovered her husband's infidelity. He noted that appellant reported numerous factors influencing her depression, including her divorce and lingering bitterness toward her ex-husband and former friend, with whom her ex-husband was unfaithful, as well as deaths in the family and living in a new area which she did not like. Dr. Hartman also noted her history of employment injury but did not discuss its effect on her emotional health. He explained that appellant had a family history of depression, as her mother suffered from untreated depression and her aunt recently committed suicide.

By decision dated August 23, 2007, the hearing representative affirmed the denial of appellant's recurrence of disability claim. He concluded that appellant's left knee condition was not work related. The hearing representative also found that the evidence of record did not support that appellant had an employment-related emotional condition.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹

Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.²

Section 8123(a) of the Federal Employees' Compensation 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.³ When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for right knee medial meniscus tear and an earlier recurrence of disability. Appellant began working full time in a light-duty job, as a receptionist, effective November 21, 2005. She stopped work on May 18, 2006, alleging a recurrence of disability. The Board finds that appellant has not established that she sustained a recurrence of disability on May 18, 2006.

First, appellant has not established a spontaneous change in the nature and extent of her injury-related condition. She submitted several notes from Dr. Bakirtzian, who noted her continuing complaints of right knee pain and diagnosed osteoarthritis. In Dr. Bakirtzian's February 8, 2006 note, he explained that appellant complained of right knee pain when she tried to push up from her seat but he did not indicate that she was totally disabled. In his May 31, 2006 report, he diagnosed osteoarthritis, a degenerative condition. Dr. Bakirtzian did not support that appellant's osteoarthritis resulted from a spontaneous change in appellant's accepted condition, nor did he specifically address how appellant's disability for her light-duty job was due to her original medial meniscus tear. Dr. Bakirtzian did not provide a rationalized medical opinion, either at the time of appellant's claimed recurrence or thereafter, explaining how she experienced a recurrence of disability beginning May 18, 2006 causally related to her original right knee injury.

Following her claimed recurrence of disability, appellant visited several other physicians. In an October 11, 2006 second opinion report, Dr. Horn diagnosed early osteoarthritis and explained that appellant's condition was compatible with nonwork-related degenerative changes. On January 10, 2007 Dr. Carr also concluded that appellant's condition was attributable to degenerative changes consistent with a combination of "weight, age and post meniscectomy changes." Although he found that appellant's employment injury caused mild disability, he did not specifically explain how or why her disability beginning May 18, 2006 was due to the original employment injury. In his May 14, 2007 report, Dr. Black concluded that appellant's degenerative changes were a "natural progression" following her work-related medial

² 20 C.F.R. § 10.5(x).

³ 5 U.S.C. § 8123(a); see *Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

⁴ See *Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

meniscectomy. However, he did not specifically address whether appellant's condition beginning May 18, 2006 was due to the original employment injury but instead indicated that she could perform sedentary work. None of the above physicians found a spontaneous change in appellant's injury-related condition, attributable to a recurrence of disability on May 18, 2006.

The record reflects that the Office referred appellant to Dr. Black for an impartial examination to resolve a medical conflict between Dr. Horn and Dr. Bakirtzian, concerning her disability due to the employment injury. The Board notes, however, that there was no conflict between the two physicians regarding disability due to the work injury. In particular, Dr. Bakirtzian, as noted above, did not specifically attribute any total disability to appellant's employment injury. In any event, a simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.⁵ Therefore, the Board finds that there was no conflict in the medical evidence and Dr. Black was not an impartial medical examiner.⁶

The Board also finds that appellant has not established a change in the nature and extent of her limited-duty job assignment. In her June 21, 2006 statement, appellant alleged, first, that her limited-duty job assignment was temporary and the employing establishment no longer had work for her to do and second, that she was required to lift and move packages in excess of her restrictions. However, the evidence does not show that the employing establishment terminated appellant's light-duty assignment before she stopped work or that her duties exceeded her physician's restrictions.

On June 26, 2007 the employing establishment provided a position description for appellant's light-duty job and explained that her position was sedentary and remained so, noting that the permanent incumbent of the position was wheelchair bound. The employing establishment explained that lifting and moving of packages was not a job requirement. Appellant also asserted that work restrictions from Dr. Black supported her contention that the requirements of the light-duty position exceeded her restrictions. However, Dr. Black did not review the duties of appellant's light-duty position and his work restrictions were not issued until nearly a year after appellant stopped work. While the employing establishment acknowledged that appellant's light-duty position was temporary, there is no evidence supporting that it withdrew the position before appellant stopped work. The evidence indicates that the position remained available until after appellant stopped work.

Accordingly, because appellant has established neither a change in the nature and extent of her injury-related condition nor a change in the nature and extent of her light-duty job requirements, the Board finds that she has not met her burden of proof in establishing that she sustained a recurrence of disability in the performance of duty.

⁵ *John D. Jackson*, 55 ECAB 465 (2004).

⁶ His reports can still be considered for its own intrinsic value. See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

LEGAL PRECEDENT -- ISSUE 2

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, which is attributable to the employee's own intentional conduct.⁷

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.⁸ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁹

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof in establishing that she developed an emotional condition as a consequence of her accepted right knee injury.

The record reflects that appellant was diagnosed with depression. Her psychiatrist, Dr. Hartman, related her depression to several factors, namely lingering emotions related to her divorce, deaths in the family, dissatisfaction with her living environment and a family history of depression. Although he noted appellant's history of employment injury and continuing pain therefrom, he did not relate her depression to her accepted medial meniscus tear or its residuals. Dr. Hartman noted appellant's employment injury in her reviewing her medical history, but he did not discuss how any depression or emotional condition would have been a consequence of the accepted right knee injury. As noted above, Dr. Hartman related her depression to her divorce, deaths in the family, living in an area she did not like and a family history of depression. He did not relate appellant's depression to her employment injury or to any other employment factor. Appellant also asserted that Dr. Horn indicated that she seemed depressed. However, Dr. Horn did not specifically attribute any depression or emotional condition to the accepted injury or its residuals.

Therefore, the Board finds that appellant has not met her burden of proof in establishing that she developed an emotional condition as a consequence of her accepted conditions.

The Board also finds that appellant has not met her burden of proof in establishing that her left knee condition was a consequence of her accepted right knee condition. In her May 18, 2006 recurrence of disability claim, appellant asserted that she was beginning to experience left knee symptoms in addition to her right knee pain. The record reflects that appellant underwent a left total knee replacement in 2007. However, she has not submitted evidence establishing that her left knee condition is causally related to her accepted right knee injury. Moreover, in his

⁷ See *Charles Garrett Smith*, 47 ECAB 562 (1996).

⁸ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁹ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

October 30, 2006 report, Dr. Horn concluded that appellant's left knee condition was due to degenerative changes and was not related to her accepted right knee conditions. Likewise, Dr. Black found no basis on which to attribute the left knee condition to the accepted right knee injury. Appellant did not submit any rationalized medical reports specifically addressing her left knee condition and relating it to her accepted employment-related right knee condition. Therefore, the Board finds that appellant has not established that she sustained a left knee injury as a consequence of her accepted right knee injury.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on May 18, 2006, causally related to her accepted employment injury. The Board also finds that appellant has not met her burden of proof in establishing that she developed any consequential injury due to her accepted right knee injury.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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