

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

H.D., Appellant

and

**DEPARTMENT OF THE NAVY, PUGETS
SOUND NAVAL SHIPYARD, WA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-348
Issued: July 11, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 30 2007 merit decision 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 claim.

ISSUE

The issue is whether appellant has established that he sustained an occupational disease in the performance of duty.

FACTUAL HISTORY

On February 1, 2006 appellant, then a 51-year-old maintenance worker, filed an occupational disease claim alleging that he sustained a loss of cartilage in both knees and an aggravation of his lower back condition as a result of his employment specifically: working on asphalt and steel surfaces for 8 to 12 hours a day, climbing ladders, working on his hands and knees, cleaning small spaces and bumping his knees on hatches and piping.

Appellant submitted a job description for temporary services and waste management worker, which included the ability to lift or carry 60 pounds and occasionally more. The Office also received progress notes dated from June 26, 2003 to January 20, 2006 from Dr. Bosco Soares, Board-certified in physical medicine and rehabilitation, were submitted.

On February 15, 2006 the Office requested additional information. Appellant responded in a March 3, 2006 letter.

In an April 11, 2006 decision, the Office denied appellant's claim, finding that the medical evidence did not establish that the claimed medical conditions were related to the established events. The Office found that appellant was diagnosed with bilateral knee arthritis and that the medical reports stated that his knee deterioration aggravated his back but there was no medical opinion as to the causal relationship between his employment and his knee condition.

On April 25, 2006 appellant requested an oral hearing. Additional evidence was submitted. In a May 17, 2006 progress note, Dr. Karen M. Wooten, Board-certified in physical medicine and rehabilitation, opined that appellant had bilateral medial compartment knee osteoarthritis with bilateral patellar compartment osteoarthritis with inflammation of his chronic back pain in the past six to nine months based on biomechanical postural changes with ambulation. She stated that appellant had degenerative changes in the medial compartments of his knees which progress overtime as evidence by x-rays from 2003. Dr. Wooten further explained that the degree of appellant's physical labor in his job was very likely to contribute to the continuing progress of the disease and pain. She also stated that appellant developed back pain again with the continuing gait disturbance based on his knee osteoarthritis which can contribute to back pain.

In a January 11, 2006 letter, Dr. Soares recommended that appellant be transferred to a sedentary job due to a history of moderate to severe bilateral knee joint osteoarthritis with bone-on-bone articulation in the medial compartments.

In a July 12, 2006 decision, the Branch of Hearings and Review vacated the previous decision and remanded the case to the Office. The Office was instructed to prepare a statement of accepted facts and refer appellant to a second opinion physician in order to determine whether the diagnosed condition of bilateral knee joint arthritis was causally related to the purported employment factors of standing on asphalt, steel surfaces, climbing ladder and crawling in confined areas and to issue a *de novo* decision after such development. The hearing representative also directed the second opinion physician to determine whether employment factors caused a permanent or temporary aggravation of appellant's back condition.

On August 3, 2006 appellant was sent for a second opinion examination with Dr. David S. Smith. In his August 3, 2006 report, Dr. Smith diagnosed severe medial compartment osteoarthritis in the right knee, severe medial compartment arthritis in the left knee, degenerative disc disease and probable old left L5 radiculopathy. He opined that appellant's bilateral osteoarthritis was not related to his job as he did not think that arthritis was unique to appellant's employment or that arthritis was caused by continuous and specific activity required of appellant. Dr. Smith opined that appellant's back conditions could not be considered to be an occupational disease as appellant had these symptoms prior to his employment and after his

retirement. He also opined that the continuing back symptoms were the natural progression of the back condition.

On August 18, 2006 the Office sent Dr. Smith's opinion to Dr. Wooten for her opinion. Dr. Wooten responded in a September 26, 2006 letter, in which she disagreed with parts of Dr. Smith's opinion. She stated that the activity of carrying 50-pound sacks or any additional weight could contribute to the degeneration of cartilage. Dr. Wooten went on to explain that it was likely that appellant's knee osteoarthritis was aggravated by his employment if he carried any extra weight.

In a September 19, 2006 report, Dr. Kenneth R. Koskella, a Board-certified orthopedic surgeon, diagnosed osteoarthritis in both knees and stated that, absent a specific injury, causation was not possible to determine. He further explained that, on a more probable than not medical basis, the type of work appellant performed at the shipyard would certainly aggravate and contribute to the progression of his arthritis. Dr. Koskella stated that there was no evidence that appellant had arthritis when he left the Navy, prior to his employment, as he could perform a physical readiness test without difficulty.

Progress notes dated January 9 to June 19, 2006 were submitted.

On October 31, 2006 the Office determined that a conflict existed in the medical opinion evidence and referred appellant for an impartial medical examination with Dr. William T. Thieme, Board-certified in orthopedic surgery, who reviewed the medical evidence of record, as well as the statement of accepted facts and issued a report. In a October 31, 2006 report, Dr. Thieme opined that appellant's low back condition was not related to work activities as he had a history of preexisting low back condition and that there was no history of an acute injury to the back at work. He also opined that appellant's bilateral severe medial compartment degenerative arthritis of the knees was not work related and was probably the product of normal progression of the arthritic process. Dr. Thieme noted that appellant had no history of an acute injury to either knee while at work. He also opined that the injuries appellant described of striking his knees while working, would not be expected to cause degenerative arthritis. Dr. Thieme found that the symmetrical progress of the degenerative changes in the knees indicated a constitutional process rather than by an injury. He also did not think that work activities described were stressful to the knees.

In an October 31, 2006 work capacity evaluation Dr. Thieme stated that appellant had permanent restrictions for walking, standing, bending, lifting squatting, kneeling and climbing but that none of the restrictions were the consequence of a work-related injury.

On November 13, 2006 the Office denied appellant's claim based on Dr. Thieme's opinion that his back and knee conditions were not related to work activities.

On February 15, 2007 appellant requested reconsideration arguing that both Dr. Thieme and Dr. Smith's reports were not thorough or factually accurate.

In an August 30, 2007 merit decision, the Office denied modification of the previous opinion. It found that Dr. Thieme's opinion was based on a complete and accurate factual and

medical history and adopted his opinion that appellant's lower back and bilateral knee conditions were not related to work activities.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and 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 or specific condition for which compensation is claimed is causally related to the employment injury.¹

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 the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the 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 factors identified by the claimant.²

Section 8123(a) 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.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

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.⁵

¹ *Anthony P. Silva*, 55 ECAB 179 (2003).

² *Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005).

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).

⁵ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810(11)(c)(1)-(2) (April 1993).

ANALYSIS

The Board finds that the case is not in posture for decision as the conflict in the medical evidence has not been resolved. The Office should have requested that Dr. Thieme provide a supplemental report.

The Branch of Hearings and Review remanded the case to the Office for further development of the medical evidence. The Office sent appellant out for a second opinion examination with Dr. Smith. As there was a conflict in opinion between Dr. Smith and Dr. Wooten, appellant was sent to Dr. Thieme for an impartial medical examination. Dr. Thieme opined that appellant's back and knee conditions were not work related because there was no history of an acute injury to either the back or knees. He also opined that the degenerative changes in the knees indicated a constitutional process rather than by an injury. The issue to be resolved by Dr. Thieme was whether appellant's medical conditions were caused aggravated or exacerbated due to the identified work factors, which included working on his hands and knees and striking his knees against hard surfaces. His report did not fully address this issue. Dr. Thieme did not explain why a sole traumatic injury could cause appellant's condition, while working on his hands and knee and repeated injuries of striking his knees over a period of time could not cause or aggravate the conditions.

Additionally, Dr. Thieme's report was not based on a proper factual background. His report did not incorporate all of appellant's accepted employment duties into his consideration of causal relationship. As such, his report requires clarification.

On remand, the Office should further develop the medical evidence and obtain a supplemental report from Dr. Thieme to address the issue of whether appellant's accepted work activities aggravated his diagnosed conditions. Following this and any other further development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's occupational disease claim.

CONCLUSION

The Board finds that Office did not properly develop the medical evidence and should be remanded for further development.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2007 decision of the Office of Workers' Compensation Programs is vacated and remanded.

Issued: July 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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