United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No.11-1606**
	)	**Issued: April 2, 2012**
SMITHSONIAN INSTITUTION, NATIONAL GALLERY OF ART, Alexandria, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 22, 2011 appellant filed a timely appeal from a January 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] and 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 sustained a consequential right-knee injury as a result of his accepted 2004 left knee and back conditions.

FACTUAL HISTORY

OWCP accepted that on August 31, 2004 appellant, then a 52-year-old pipefitter, sustained a lumbar strain and disruption of a left-sided old anterior cruciate ligament medial meniscus tear of the left knee as a result of lifting an intake grill at work. Appellant was placed

[1] 5 U.S.C. § 8101 *et seq.*

on the periodic rolls for temporary total disability beginning October 2004. He submitted several medical reports and documents regarding medical treatment for his left knee and lumbar conditions. Appellant underwent authorized left knee surgery on August 23, 2007 and November 3, 2009.

In a February 23, 2007 handwritten statement, appellant related that on August 31, 2004 he injured his back and left knee at work. He stated that, during a January 11, 2007 examination, he told Dr. Philip Bovell, an orthopedic surgeon, that he was having problems with his right knee. Dr. Bovell informed appellant that his right knee was painful because he was putting excess stress on it. Appellant stated that his right knee condition was related to his August 31, 2004 work injury and constituted a consequential injury.

In a May 24, 2007 report, Dr. Daniel Ignacio, Board-certified in physical medicine and rehabilitation, noted appellant's continued complaints of pain along the lower back and knee and related that he now complained of some pain along the right knee as well. Upon examination of the left knee, he observed moderate swelling with limited movement, tenderness along the infrapatellar region and flexion to 70 degrees. Dr. Ignacio also noted hypoesthesia along both legs. Examination of the right knee revealed flexion to 80 degrees with infrapatellar tenderness. Dr. Ignacio diagnosed chronic progressive lumbar disc syndrome, chronic lumbar radiculopathy and chronic synovitis of the left knee.

In a May 31, 2007 magnetic resonance imaging (MRI) scan examination, Dr. Howard Sachs, a Board-certified diagnostic radiologist, observed a small, 7.0 millimeters cortical-based cyst on the tibial plateau just medial to the midline in appellant's right knee. His menisci, cruciate ligaments, collateral ligaments, patellar and quadriceps tendons were intact. Dr. Sachs concluded that appellant had small degenerative cysts on the surface of the tibial plateau and a 2.0 centimeters sized cyst in the tibiofemoral joint just posterior to the tibial attachment of the right knee.

In a June 21, 2007 medical report, Dr. Ignacio related appellant's complaints that his low back and leg pain remained unresolved. Examination of the lumbar spine revealed trigger point along the L4, L5 paraspinal muscles, moderate tenderness along the lumbar spine and moderate muscle spasm along the lumbar spine at the areas of L2, L3 and L4 levels. Straight leg raise test was positive to 60 degrees on the right side and 70 degrees on the left side. Examination of the lower extremity revealed moderate swelling along both knees, particularly the left knee with limited motions along the legs due to pain. Dr. Ignacio diagnosed lumbar disc syndrome and radiculopathy and degenerative joint disease of both knees. Appellant submitted various medical reports by Dr. Ignacio from 2007 until 2010 regarding treatment for appellant's lumbar spine and both knees.

In a July 6, 2007 medical report, Dr. Bovell noted that he had treated appellant for chronic low back pain syndrome and instability over his left knee and stated that he recently complained of discomfort over the right knee. He observed that an MRI scan showed right knee degenerative joint disease, but no tear of the meniscus. Dr. Bovell recommended water therapy and debridement and irrigation of the degenerated joint disease of the right knee. Appellant submitted various medical reports by Dr. Bovell from 2007 until 2010 regarding treatment for his lumbar spine and both knees.

In an October 15, 2007 handwritten statement, appellant explained that on July 23, 2007 he sent OWCP a letter about his right knee. He related that his physicians informed him that he put more weight on his right knee because of his August 31, 2004 employment injuries, which caused severe pain, swelling and weakness in his right knee. Appellant noted that his physicians had sent OWCP all his medical reports about his right knee, which he believed resulted from his work-related back and left knee conditions. He also pointed out that OWCP approved an MRI scan examination, knee brace and water therapy for his right knee and requested that if his right knee was accepted for a consequential injury that he needed a letter to confirm the acceptance.

In a November 26, 2007 orthopedic consultation report, Dr. Nigel M. Azer, a Board-certified orthopedic surgeon, examined appellant for complaints of bilateral knee pain. He provided an accurate history of injury regarding the August 31, 2004 employment injury and reviewed appellant's medical records. Dr. Azer pointed out that appellant's left knee was more symptomatic than his right knee. Examination of the left knee revealed valgus alignment, active range of motion and stable valgus and varus stressing. Examination of the right knee revealed no effusion with some crepitus in the patellofemoral articulation and some diffuse medial joint line tenderness. Dr. Azer diagnosed valgus tricompartmental post-traumatic arthritis of the left knee and early varus arthritis of the right knee.

In a May 8, 2008 handwritten statement, appellant stated that his right knee was a consequential injury and related that his physicians informed him that his right knee was becoming worse because he put too much excess stress on it.

On May 22, 2008 appellant filed a recurrence claim for his right knee.[2]

On November 19, 2008 OWCP referred appellant to a district medical adviser to determine whether his right knee condition was causally related to his accepted injuries and whether a left total knee arthroplasty was medically warranted for treatment of his accepted knee condition.

In a November 25, 2008 report, the district medical adviser stated that he reviewed the medical records and noted that on August 31, 2004 appellant injured his lower back and left knee at work. He opined that appellant's right knee condition was not in any way related to the August 31, 2004 injury but was a preexisting injury that required surgery. The medical adviser concluded that appellant's right knee resulted from a preexisting condition and was not a consequential injury to his August 31, 2004 employment injury.

In a March 24, 2009 consultation report, Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon, noted appellant's complaints of persistent left knee and lower back pain radiating into his legs and of increased right knee pain. He stated that appellant had confirmed end-stage arthritis of the right knee and herniated disc at L4-5 as a result of his August 31, 2004 injury. Dr. Jackson recommended that appellant avoid all activities that may aggravate his condition, including lifting, pushing and pulling and continue his pain management treatments.

[2] Appellant submitted additional recurrence claims alleging that his right knee was worsening as a result of his August 31, 2004 employment injuries.

In a May 12, 2009 handwritten statement, appellant explained that the April 6, 2009 claim for recurrence was actually a claim for a right knee consequential injury. He stated that he had problems with his right knee because of his accepted back and left knee conditions and explained that because of his back and left knee problems he put excess stress on his right knee.

In a May 1, 2009 medical report, Dr. Ignacio noted appellant's complaints of continued left knee and low back pain as a result of an August 31, 2004 work injury and the development of right knee pain with some swelling. He reviewed appellant's medical records and conducted a physical examination. Dr. Ignacio observed limited lumbar flexion to 60 degrees and multiple trigger points along the lumbar paraspinal muscles. Straight leg raise tests were positive for both sides. Examination of the left knee revealed moderate swelling, limited flexion to 70 degrees and extension to -20 degree. Examination of the right knee revealed mild swelling, limited flexion to 70 degrees and extension to -15 degrees. Dr. Ignacio diagnosed chronic internal derangement of the left knee, chronic lumbar disc syndrome with chronic lumbar radiculopathy, chronic internal derangement of the right knee with traumatic ganglion cyst and chronic pain syndrome secondary to the above. He explained that because of appellant's continued problems with his left knee and lumbar spine he put more of his weight along the right knee in order to protect his left knee, which caused inflammation, swelling and strain along the right knee. Accordingly, Dr. Ignacio opined that appellant's right knee condition was causally related to the August 31, 2004 injury. He concluded that appellant's right knee medical conditions and injuries were consequential to the work-related medical conditions of August 31, 2004 and required continued medical treatment.

On August 24, 2009 OWCP referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion examination. In a September 10, 2009 medical report, Dr. Draper reviewed the statement of accepted facts and appellant's medical records. He noted that a May 31, 2007 MRI scan of the right knee revealed small degenerative cysts on the surface of the tibial plateau and a 2.0 centimeters sized cyst in the tibial femoral joint just posterior to the tibial attachment. Appellant related that he developed some wear and tear in his right knee because he shifted his weight from the left knee to the right knee due to the pain in his left knee. He believed that the right knee was consequentially related to the August 31, 2004 employment incident.

Examination of the right knee revealed full extension and 120 degrees of flexion. Dr. Draper observed some crepitus in the right knee on range of motion, but no evidence of instability, anterior and posterior drawer signs and effusion. He diagnosed lumbosacral strain, osteoarthritis of the left knee and early degenerative arthritis of the right knee with degenerative cyst on the surface of the tibial plateau. Dr. Draper noted that appellant's complaints for his right knee began in 2007, many years after the August 31, 2004 employment injury. He found no evidence that appellant actually injured his right knee on August 31, 2004. Instead, Dr. Draper opined that appellant had early changes of osteoarthritis in the right knee, which was not causally related or aggravated by the August 31, 2004 employment injury. He explained that shifting weight from the left side to the right side was not a cause of appellant's osteoarthritis and did not aggravate the presence of osteoarthritis of the right knee. Dr. Draper reported that appellant was not totally disabled and authorized him to return to a job that would not require him to lift more than 50 pounds occasionally and 25 pounds frequently.

In an October 10, 2009 report, Dr. Ignacio disagreed with Dr. Draper's September 10, 2009 second-opinion report contending that he relied on erroneous history. He stated that appellant did not deny weakness or giving way of his knees, but complained of significant pain and weakness. Dr. Ignacio also alleged that Dr. Draper's examination was incomplete because he indicated that appellant's left knee strength was +5, which was impossible since he had two left knee surgeries. He reiterated that appellant developed right knee pain as a result of shifting his weight due to his left knee pain and concluded that the right knee pain and osteoarthritis was a post-traumatic consequential injury to the August 31, 2004 injury.

On February 19, 2010 OWCP found a conflict in the medical opinion evidence between Dr. Ignacio and Dr. Draper regarding whether appellant's right knee condition was causally related to his accepted left knee and back conditions. It referred appellant, together with a statement of accepted facts and the medical record, to Dr. David Dorin, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 12, 2010 report, Dr. Dorin provided an accurate history of injury regarding the August 31, 2004 employment incident and thoroughly reviewed appellant's medical records from April 29, 2005 to January 25, 2010 regarding his left knee and lumbar conditions. He noted that in reviewing the records he did not find any mention of symptoms, diagnosis or causal relationship regarding appellant's right knee problems and the August 31, 2004 injury. A May 31, 2007 MRI scan of the right knee revealed a cortical base cyst in the tibial plateau just medial to the midline of seven millimeters and another one of three millimeters anteriorly, medial to the midline. Dr. Dorin disagreed with Dr. Ignacio that the 2007 MRI scan revealed arthritis of the knee because appellant's menisci, cruciate ligaments and patellar and quadriceps tendons were intact. He noted that the small cysts were preexistent and unrelated to the August 31, 2004 injury. Dr. Dorin further explained that the transfer of weight from the left leg to the right leg would not produce any arthritic condition to the right knee.

Upon examination of the right knee, Dr. Dorin did not find any visible deformity, palpable swelling or effusion in the suprapatellar pouch, tenderness of the patellofemoral joint with direct pressure and palpation or instability of the anterior or posterior cruciate ligaments. He observed satisfactory strength of flexion and extension against resistance with no evidence of undue laxity. Stress loading maneuvers did not produce any symptoms in the medial or lateral compartment of the knee and the McMurray's test was negative. An MRI scan of the right knee revealed two very small cysts between three to seven millimeters in the posterior aspect, medial to the midline of the knee with no visible evidence of damage to the articular surface of the tibia and femur. Dr. Dorin reviewed appellant's diagnostic results and found no evidence of degenerative arthritis of the knee, but noted that there might possibly be some slight narrowing of the medial compartment of the knee. He stated that based on the extensive documentation he reviewed appellant's right knee symptoms were not consequential to his August 31, 2004 injury. Dr. Dorin explained that appellant's right knee symptoms did not appear until 2007 and consisted of tenderness of the patellar tendon and swelling, but no evidence of effusion, synovitis or documented arthritis of the knee. He concluded that appellant's right knee symptoms were due to the natural evolution of degenerative changes and that the small cyst on the tibofemoral joint was not causally related to or consequential to the August 31, 2004 injury.

In a decision dated April 12, 2010, OWCP denied appellant's claim finding insufficient medical evidence establishing that he developed a right knee condition as a result of his accepted August 31, 2004 employment injury. It found that the weight of the medical evidence was with Dr. Dorin's impartial medical examiner report, which found that appellant's right knee condition was not causally related to his accepted lumbar and back conditions.

In a letter dated May 5, 2010, appellant disagreed with the denial decision and noted that the bills for treatment of the right knee had been paid for. He also contended that Dr. Dorin did not thoroughly examine his right knee during the impartial medical examination. Appellant submitted copies of many medical reports that were previously submitted.

On May 19, 2010 appellant filed a request of the written record along with several reports and documents previously on file. By decision dated June 11, 2010, OWCP denied his request for a review of the written record as untimely filed.

In a letter dated August 28, 2010, appellant appealed the June 11, 2010 decision denying his request for a review of the written record as untimely. He stated that OWCP issued its decision on April 12, 2010 and that he mailed his package *via* express mail on May 6, 2010. The package was delivered on May 7, 2010 and was received by Mark Beal. In a September 23, 2010 letter, OWCP determined that appellant did timely file his request for a review of the written record and vacated its June 11, 2010 denial decision. It noted that a copy of the delivery confirmation letter was received verifying that his appeal was delivered on May 7, 2010.

In April 1 and 9, 2010 reports, Dr. Ignacio noted that on August 31, 2004 appellant sustained an injury at work and complained of persistent pains along both knees following the injury. Examination of the left knee revealed mild swelling and diffused tenderness with limited movement, flexion to 80 degrees and extension to -15 degrees. Examination of the right knee revealed flexion to 90 degrees with infrapatellar and joint line tenderness.

In a June 28, 2010 report, Dr. Ignacio noted that on August 31, 2004 appellant sustained an injury at work. Appellant underwent multiple surgeries for his left knee and developed pain along the lower back and right knee. Examination of the right knee revealed swelling and limited flexion to 70 degrees and extension to -15 degrees. Dr. Ignacio diagnosed chronic right knee pain and complex regional pain syndrome. He stated that appellant's right knee injury was related to the left injury and explained that the overuse of the right knee as a result of left knee pain and the weakness from frequent falls strained the right knee. Accordingly, the right knee condition was consequential to the August 31, 2004 employment injuries.

By decision dated January 11, 2011, OWCP denied appellant's claim finding insufficient medical evidence establishing that he developed a right knee condition as a result of his accepted August 31, 2004 employment injuries. It found that the weight of the medical evidence was with Dr. Dorin's impartial medical examiner report, which found that appellant's right knee condition resulted from the natural degenerative process and not a result of his accepted conditions.

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 attributable to the employee's own intentional conduct.[3] The Board has held that the subsequent progression of an employment-related condition "remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[4] If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, *i.e.*, "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances."[5]

A claimant bears the burden of proof to establish a claim for consequential injury. As part of this burden, he must present rationalized medical opinion evidence, based on a complete medical and factual background, establishing causal relationship.[6] Rationalized medical opinion evidence is medical evidence, with stated reasons of a physician, on whether there is a causal relationship between the employee's diagnosed condition and the specified employment factors or incident.[7] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[8]

If there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[9] In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

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[3] *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994); *John R. Knox*, 42 ECAB 193, 196 (1990).

[4] *Raymond A. Nester*, 50 ECAB 173, 175 (1998); *Robert W. Meeson*, 44 ECAB 834, 839 (1993).

[5] *S.M.*, 58 ECAB 166 (2006); *Raymond A. Nester, id.*

[6] *Jennifer Atkerson*, 55 ECAB 317 (2004); *R.C.*, Docket No. 10-1789 (issued April 22, 2001).

[7] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] *D.S.*, Docket No. 09-860 (issued November 2, 2009); *B.B.*, 59 ECAB 234 (2007).

[9] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[10] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

Appellant alleges that he sustained a right knee condition as a consequence of his accepted August 31, 2004 injuries. Dr. Ignacio, appellant's treating physician, opined that appellant's right knee condition was related to his accepted back and left knee conditions as he had to put extra force and stress on his right side. Dr. Draper, an OWCP referral physician, found that appellant's right knee symptoms were due to a degenerative condition and were not causally related to his accepted employment injuries. OWCP found a conflict of medical opinion regarding whether appellant's right knee condition resulted from the August 31, 2004 injuries. It referred him to Dr. Dorin, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to 5 U.S.C. § 8123(a).

In a March 12, 2010 report, Dr. Dorin reviewed the medical evidence of record, conducted a physical examination and determined that appellant's right knee symptoms were not causally related to or consequential to his accepted August 31, 2004 employment injury. Upon examination of appellant's right knee, he did not observe any visible deformity, palpable swelling or effusion or instability. Dr. Dorin noted satisfactory strength of flexion and extension against resistance with no evidence of undue laxity. Appellant's right knee was also stable to stress loading maneuvers and tested negative for McMurray's test. An MRI scan of the right knee further revealed two very small cysts between three to seven millimeters in the posterior aspect, medial to the midline with no visible evidence of damage to the articular of the tibia and femur. Dr. Dorin opined that the small cysts were preexistent and unrelated to appellant's accepted conditions. He noted that appellant's right knee symptoms did not appear until 2007, three years after the August 31, 2004 employment injury and that diagnostic tests showed no evidence of effusion, synovitis or arthritis of the knee. Dr. Dorin concluded that appellant's right knee symptoms were due to the natural evolution of degenerative changes and not causally related or consequential to the August 31, 2004 injury.

The Board finds that the special weight of the medical evidence rests with the opinion of Dr. Dorin. A reasoned opinion from a referee examiner is entitled to special weight.[11] The Board finds that Dr. Dorin provided a well-rationalized opinion based on a complete factual background, statement of accepted facts, a review of the medical record and physical examination findings. Dr. Dorin determined that appellant's right knee symptoms were not related to his August 31, 2004 employment injuries. Thus, his opinion is entitled to special weight and represents the weight of the medical evidence.

The medical evidence appellant subsequently submitted is insufficient to overcome the weight accorded Dr. Dorin regarding whether appellant sustained a right knee condition as a consequence of the August 31, 2004 employment injuries. In reports dated April 1 and 9 and June 28, 2010, Dr. Ignacio reiterated his prior opinion that appellant's right knee condition was directly rated to his accepted left knee injury because he put additional stress and weight on his right side. The Board has found that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[12] Thus, the

[11] *D.T.*, Docket No. 10-2258 (issued August 1, 2011); *Gloria J. Godfrey, id*.

[12] *I.J., supra* note 7; *Barbara Warren*, 51 ECAB 413 (2000).

Board finds that Dr. Dorin's impartial medical examiner's opinion represents the weight of the medical evidence.

The additional medical evidence is likewise insufficient to overcome the weight accorded Dr. Dorin regarding whether appellant sustained any right knee condition as a consequence of the August 31, 2004 employment incident. Appellant submitted medical reports by Drs. Sachs, Azer, Jackson, and Bovell who treated appellant for complaints of lumbar and bilateral knee pain. None of the physicians, however, offered an opinion on whether appellant's right knee condition was causally related to his accepted employment injuries. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13]

While appellant has noted that OWCP has paid some medical expenses related to his alleged right knee condition, the Board has held that OWCP's gratuitous payment for medical treatment, without more, does not constitute acceptance of a medical condition.[14]

On appeal, appellant disagreed that his right knee problems were a preexistent injury because he did not experience right knee pain until he injured his left knee and back on August 31, 2004. He noted that he had injured his right knee in 1993 and had surgery on his right knee in 1996, but he reiterated his belief that his current right knee condition was a consequential injury from his 2004 left knee and back injury. Causal relationship, however, is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[15] As appellant has failed to provide rationalized medical opinion evidence establishing that he sustained a consequential right knee injury as a result of his accepted injuries, he has failed to meet his burden of proof in this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a right knee condition as a consequence of his August 31, 2004 left knee injuries.[16]

[13] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *A.D.*, 58 ECAB 149 (2006).

[14] *See Gary L. Whitmore*, 43 ECAB 441 (1992); *James F. Aue*, 25 ECAB 151 (1974).

[15] *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-658 (issued October 22, 2009); *D.I.*, 59 ECAB 158 (November 6, 2007).

[16] The Board notes that appellant submitted additional evidence following the January 11, 2011 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board