United States Department of Labor
Employees' Compensation Appeals Board

K.W., Appellant	)	
and	)	**Docket No. 18-1523**
	)	**Issued: May 22, 2019**
U.S. POSTAL SERVICE, LAMOND RIGGS STATION, Washington, DC, Employer	)	

Appearances:
Benjamin A. Klopman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 6, 2018 appellant, through counsel, filed a timely appeal from April 5 and June 19, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP).[2]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated March 8, 2019, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1523 (issued April 18, 2019).

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[4]

ISSUE

The issue is whether OWCP abused its discretion by denying appellant's request for authorization of left knee surgery.

FACTUAL HISTORY

On March 21, 2015 appellant, then a 44-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2015 he injured his back, left knee, and neck, when he slipped on ice and snow when descending steps delivering mail while in the performance of duty. He stopped work on the date of injury and has not returned. OWCP accepted the claim for conditions of effusion of joint, left lower leg, and sprain of ligaments of lumber spine.

Dr. Dana Mueller, a Board-certified internist, saw appellant on April 20, 2015. Following a physical examination she diagnosed left knee effusion and acute low back pain.

Dr. Carl S. Lederman, a Board-certified radiologist, advised that an April 20, 2015 magnetic resonance imaging (MRI) scan of the left knee demonstrated severe degenerative changes in the femoropatellar joint with no meniscal tear or ligamentous injury. Dr. Louis Napoli, a Board-certified radiologist, interpreted a July 17, 2015 left knee x-ray as showing advanced patellofemoral degenerative disease.

Dr. Easton L. Manderson, a Board-certified orthopedic surgeon, began treating appellant. On July 17, 2015 he described a history that on March 2, 2015 appellant had slipped and fell down six stairs and struck his left knee against an object and also struck his lower back on a concrete object. Dr. Manderson noted that appellant had painful range of motion and weakness in his left knee. He disagreed with the radiologist's interpretation of appellant's left knee x-ray, maintaining that it demonstrated severe post-traumatic arthritis rather than changes of a degenerative nature because appellant would not have been able to deliver mail if he had severe degenerative arthritis. Dr. Manderson continued to submit reports on an approximately monthly basis, advising that the accepted conditions should be chondromalacia patella and patellofemoral arthritis of the left knee. On September 2, 2015 he indicated that the treatment of choice for appellant's left knee was arthroscopy to determine whether he was a candidate for cartilage grafting of the patellofemoral joint or for total knee replacement. On September 22, 2015 Dr. Manderson advised that the "treatment of choice" was left total knee arthroplasty.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the June 19, 2018 decision, OWCP received additional evidence and appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Dr. Manderson submitted reports dated October 13, 2015 to March 16, 2016. He reiterated that appellant needed left knee arthroscopy for post-traumatic patellofemoral arthritis.

OWCP referred appellant to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 11, 2016 report, Dr. DiLallo noted his review of the statement of accepted facts (SOAF) and medical record.[5] He described the March 2, 2015 employment injury and appellant's complaints of continued back and knee pain. Dr. DiLallo reported that appellant had an antalgic gait, used a cane, and wore a left knee brace. Left knee examination demonstrated no increased heat and slight synovial thickening. Appellant complained of exquisite tenderness on palpation superolaterally. Stability was good, and evaluation of muscle strength with appellant seated was 5/5 in all muscle groups. Sensation to pinprick was not distorted in the lower extremities. Knee and ankle reflexes were intact and symmetrical bilaterally. Bilateral seated straight leg raising was accomplished without apparent increased discomfort. Dr. DiLallo indicated that diagnoses were not clearly established. He noted the lack of objective findings and that appellant's complaints were far beyond what one would see in a condition of patellofemoral or degenerative arthritis in general, no matter the cause. Dr. DiLallo advised that he knew of "no orthopedic code" for his reported symptoms, but that his condition was precipitated by the employment injury. He indicated that it would take a dramatic event to reverse appellant's symptom complex that had become embedded in his psyche and activity level. Dr. DiLallo recommended electromyography for confirmation of radicular pain or radicular impairment and even a diagnostic injection of local anesthetic into the knee to see if there was relief of pain and, beyond that, pain management would seem to be the only way in which he could be restored to his preinjury condition. He opined that appellant appeared to be a "total cripple" due to his employment injury, but this was not based on any objective findings, noting that his left knee MRI scan showed preexisting degenerative changes. Dr. DiLallo advised that appellant had subjective residuals of the March 2, 2015 employment injury, but no objective anatomic basis was identified.

On March 29, 2016 Dr. Manderson requested authorization for left knee surgery. He proposed arthroscopic surgery with possible osteochondral autograft transfer, quadriceps realignment, and lateral retinacular release in an effort to prevent or delay a total knee replacement procedure. On April 8, 2016 OWCP notified Dr. Manderson that authorization for the requested surgery was denied, noting that further medical development would be done.

In reports dated April 6 and 27, 2016, Dr. Manderson noted that appellant's left knee complaints had not changed. He reiterated that appellant had post-traumatic arthritis of his left knee and required arthroscopic surgery.

On September 28, 2016 OWCP asked its district medical adviser (DMA) for an opinion regarding the need for left knee arthroscopic surgery. On October 4, 2016 Dr. Todd Fellars, a Board-certified orthopedic surgeon, noted his review of the SOAF and medical record. He opined that the proposed knee arthroscopy was not causally related to the accepted condition of left knee effusion, noting that it would be treatment for patellofemoral joint arthritis. The DMA continued that appellant had a constellation of symptoms that were inconsistent with patellofemoral arthritis and noted his disagreement with Dr. Manderson's opinion that appellant's current condition was

[5] Dr. DiLallo noted that the SOAF incorrectly identified appellant as female.

caused by the March 2, 2015 employment injury. He advised that post-traumatic arthritis took a significant time to develop, and that appellant was noted to have arthritis shortly after the employment incident, which was not consistent with the onset of post-traumatic arthritis and was preexisting and degenerative in nature. The DMA further noted that the MRI scan report indicated that the medial and lateral tibiofemoral compartments were okay. He concluded that, as such, the treatment would be patellofemoral arthroplasty and not total knee arthroplasty if surgery were necessary, but that, based on the accepted conditions, the surgery should be sought through appellant's private insurance.

In an October 3, 2016 report, Dr. Manderson noted that he had last seen appellant on May 27, 2016. He reiterated that the March 2, 2015 employment injury caused left knee post-traumatic arthritis, opining that no one could work delivering mail with degenerative arthritis, especially going up and down steps. Dr. Manderson noted his disagreements with the left knee x-rays and MRI scan findings and recommended left knee surgery.

In November 2016 OWCP referred appellant to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Haskins was asked whether there were additional diagnoses related to the March 2, 2015 employment injury which had not been accepted, whether the left knee arthroscopy and revision recommended by appellant's treating physician was causally related to the March 2, 2015 employment injury, and whether the requested surgery was medically necessary for treatment. He was also asked to describe objective examination findings and comment as to whether appellant had residuals of the March 2, 2015 injury.

By report dated January 3, 2017, Dr. Haskins described the employment injury and appellant's complaints of constant left knee pain. He noted his review of the SOAF and medical record, and indicated that appellant ambulated with a cane and was wearing a left knee brace. Physical examination demonstrated full extension of both knees, and active flexion to 80 degrees with no crepitus, effusion, obvious increased warmth, ligament laxity, or popliteal fullness. Palpation revealed complaints of pain about the medial joint line, the anterior knee, and laterally. Reflexes were deferred in the left knee, and left ankle reflex was normal. Left lower extremity sensation was normal, and there was no significant pretibial edema. Resistive testing revealed global decreased strength in all quadrants of the left foot with poor effort and decreased strength in hip flexion. Dr. Haskins diagnosed patellofemoral arthritis by aggravation, advising that the March 2, 2015 slip and fall temporarily aggravated the left knee arthritis. He opined that appellant's current knee complaints were secondary to a degenerative process that was evident by being present on the x-rays of the knee shortly after the employment injury, noting that the x-ray findings were not post traumatic. Dr. Haskins advised that appellant had no residuals of the employment injury, based on his examination and review of the medical record. He continued that there was no indication that the proposed left knee arthroscopy or revision of unstable kneecap proposed by the treating physician was causally related to the March 2, 2015 injury since appellant's arthritic condition, as noted on x-ray, was degenerative in nature and preexistent. Dr. Haskins further opined that the type of surgery proposed was not recommended treatment for an advanced arthritic patellofemoral joint. He concluded that appellant's knee arthritis was unrelated to the employment injury.

By decision dated March 3, 2017, OWCP denied authorization for left knee arthroplasty surgery and revision of unstable kneecap. It found the weight of the medical opinion evidence

rested with the opinion of Dr. Haskins who opined that such treatment was not medically necessary for the accepted condition.

On March 24, 2017 appellant requested a hearing before an OWCP hearing representative. Counsel subsequently submitted copies of Dr. Manderson's reports previously of record dated July 17, 2015 to April 27, 2016.

During the hearing, held on June 5, 2017, counsel maintained that appellant had no knee problems before the March 2, 2015 injury, and that Dr. Manderson gave a rationalized explanation regarding why the proposed surgery was necessary. Appellant testified that he had no left knee problems until the employment injury and that he wanted to return to work. A witness testified that she had known appellant for over 10 years and that he had no knee problems before the employment injury.

In a supplemental report dated July 6, 2017, Dr. Haskins related that patellofemoral arthritis, by aggravation, was temporary. He reiterated that appellant's current knee complaints were secondary to a degenerative process that was preexisting, and that as of January 3, 2017, the aggravation of patellofemoral arthritis had resolved.

By decision dated August 3, 2017, an OWCP hearing representative affirmed the March 3, 2017 decision denying authorization for left knee surgery, finding that the weight of the medical evidence rested with the medical opinion of Dr. Haskins who provided a better rationalized explanation.[6]

On October 24, 2017 appellant, through counsel, requested reconsideration.

Additional evidence submitted included a September 27, 2017 report in which Dr. Manderson noted his review of Dr. Haskins' report and wrote that appellant fell on his left knee on March 2, 2015. Dr. Manderson disagreed with Dr. Haskins' opinion and wrote that an "experienced examiner who examined appellant's left knee and the x-ray and MRI scan reports should notice that both studies pointed to advanced arthritis to the patellofemoral joint with essentially no or little degenerative change seen in the other three compartments, the intercondylar notch area, the medial compartment, and the lateral compartment." He opined that it was unheard of that degenerative arthritis could progress to an advanced degree in a patellofemoral joint without the same process affecting the other three compartments of the knee. Dr. Manderson further opined that it should be obvious that if appellant had preexisting advanced degenerative arthritis in the patellofemoral joint before the employment injury, it would be impossible for him to maneuver steps and stairs. He indicated that appellant had been delivering mail for many years without lost time from work related to his knee. Dr. Manderson maintained that Dr. Haskins misrepresented the true mechanism of injury, that the knee was the primary diagnosis, that the proposed surgery was knee replacement for advanced arthritis of the knee preceded by diagnostic arthroscopy, and that total knee replacement was indicated for advanced unicompartmental

[6] On September 20, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. The record does not contain a final termination decision and that issue is not presently before the Board.

arthritis of the patellofemoral joint. He concluded that his proposed surgical procedure should be approved.

Dr. Manderson examined appellant on October 3, 2017 and noted his complaint of constant, intense, and disabling left knee pain. He reiterated his findings and conclusions regarding the need for the recommended left knee surgery. In an October 11, 2017 report, Dr. Manderson indicated that, based on his recent interview and physical examination, to a reasonable degree of medical certainty, appellant was still suffering with intense, constant, and disabling pain in the left knee. He indicated that appellant could not sit with his knee flexed due to advanced patellofemoral arthritis, that he kept the knee extended with a brace around the clock, and that he could not walk without a walking aid. Dr. Manderson opined that appellant's symptoms had not subsided since the employment injury and thus, could not be described as a temporary aggravation, but rather a permanent aggravation of preexisting degenerative arthritis if this had been preexisting advanced degenerative arthritis. He, however, continued to opine that appellant had post-traumatic arthritis, noting that the radiologist did not have the history of injury, and maintaining that there was no way a person with advanced degenerative arthritis in one compartment could have little or no degeneration in all compartments unless there was a preexisting event such as trauma.

On November 16, 2017 Dr. Manderson performed the patellofemoral resurfacing arthroscopy of the left knee which he had first proposed on March 29, 2016. He described the physiologic findings of the arthroscopic examination.

By decision dated December 14, 2017, OWCP denied modification of its prior decisions. It found appellant had not presented a rationalized medical opinion along with objective findings to support authorization for the requested left knee arthroscopy in his October 11, 2017 report. The decision did not mention the November 16, 2017 operative note.

On January 22, 2018 appellant, through counsel, requested reconsideration. Counsel had noted in correspondence dated December 18, 2017 that the December 14, 2017 decision did not reference the November 16, 2017 operative procedure.

By decision dated April 5, 2018, OWCP denied modification of its prior decisions. It reviewed the November 16, 2017 operative report and found Dr. Manderson's opinion that the pathology was secondary to trauma speculative because he failed to provide a rationalized explanation of how the March 2, 2015 employment injury contributed to the condition.

Appellant, through counsel, again requested reconsideration on May 14, 2018. Dr. Manderson provided a March 28, 2018 procedure note describing a steroid injection into appellant's left knee. In an April 17, 2018 report, he again noted his disagreement with Dr. Haskins' report and reiterated his opinion that appellant had severe one compartment arthritis of the patellofemoral joint that was secondary to trauma, that it would have been impossible for appellant to work delivering mail with preexisting arthritis, and that it could not be a temporary aggravation because appellant continued to have disabling pain.

By decision dated June 19, 2018, OWCP denied modification of its prior decisions. It found the evidence of record to be of insufficient probative value to alter the prior decisions.

LEGAL PRECEDENT

Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of monthly compensation.[7] While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.[8]

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.[9] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10] To be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition. Proof of causal relationship, in a case such as this, must include supporting rationalized medical evidence.[11]

In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.[12]

ANALYSIS

The Board finds this case is not in posture for decision.

OWCP accepted effusion of joint, left lower leg, and sprain of ligaments of lumber spine, caused by a March 2, 2015 slip and fall in the performance of duty.

Dr. Manderson, who began treating appellant in July 2015, and requested authorization for a left knee arthroscopic procedure in March 2016, was consistent in his opinion that appellant's left knee arthritis was post-traumatically caused by the March 2, 2015 employment injury. He explained that appellant could not have performed his job duties as a letter carrier with severe preexisting degenerative arthritis.

[7] 5 U.S.C. § 8103; *see E.L.*, Docket No. 17-1445 (issued December 18, 2018).

[8] *J.R.*, Docket No. 18-0603 (issued November 13, 2018).

[9] *See C.L.*, Docket No. 17-0230 (issued April 24, 2018); *D.K.*, 59 ECAB 141 (2007).

[10] *J.L.*, Docket No. 18-0503 (issued October 16, 2018).

[11] *Supra* note 8.

[12] *Id.*

Following the request for surgery OWCP undertook development of the medical evidence in the claim regarding the causal relationship between appellant's arthritic left knee condition and the accepted March 2, 2015 employment injury.

Dr. Fellars, OWCP's DMA, opined on October 4, 2016 that appellant's left knee arthritis was degenerative in nature. Likewise, Dr. Haskins who performed a second opinion evaluation on January 3, 2017, advised that appellant's current left knee condition was secondary to degenerative arthritis.

Section 8123(a) of FECA provides that, if there is disagreement between OWCP's referral physician and appellant's physician, OWCP shall appoint a third physician who shall make an examination.[13] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[14] The Board finds that the medical opinions of Dr. Manderson and Dr. Haskins are of equal weight. The dispute between these physicians centers on their opinions of whether the employment injury caused or aggravated appellant's left knee arthritis and the medical necessity of the requested surgery. As noted, in order for a surgical procedure to be authorized, a claimant must submit evidence to establish that the surgery is for a condition causally related to an employment injury.[15] Accordingly, there is a conflict in medical opinion regarding the causal relationship of appellant's left knee arthritis, and therefore whether the proposed surgery should be authorized.

Because there is an unresolved conflict in medical opinion regarding this preliminary matter, pursuant to section 8123(a) of FECA,[16] the case shall be remanded to OWCP for referral of appellant, together with the medical record and an updated SOAF, to an appropriate Board-certified physician for an impartial medical examination. If the physician determines that appellant's current arthritic left knee condition was caused by the March 2, 2015 employment injury, he or she should then determine if the November 16, 2017 surgical procedure was medically warranted for the condition. Both of these criteria must be met in order for OWCP to authorize payment.[17] After this and such further developed as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[13] 5 U.S.C. § 8123(a); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019).

[14] *R.P.*, Docket No. 17-0428 (issued April 19, 2018).

[15] *Id.*

[16] *Supra* note 13.

[17] *Supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the June 19 and April 5, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 22, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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