



## ISSUE

The issue is whether appellant has met his burden of proof to establish a medical condition consequential to the accepted June 25, 2012 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On June 25, 2012 appellant, then a 47-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury that day when kneeling down to shoot at a firing range while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty and noted that he did not stop work. OWCP accepted the claim for left knee contusion. It later expanded the acceptance of appellant's claim to include aggravation of left knee medial compartment degenerative arthritis and small bowel obstruction. OWCP authorized left knee primary total knee arthroplasty, which he underwent on March 27, 2013. It paid appellant wage-loss compensation on the supplemental rolls commencing March 10, 2013 and on the periodic rolls commencing April 7, 2013.

In a report dated July 11, 2017, Dr. Jeffrey T. O'Brien, a Board-certified orthopedic surgeon serving as an OWCP second opinion physician, noted that appellant complained of back and right knee pain. A review of a magnetic resonance imaging (MRI) scan demonstrated low back degenerative disc disease. Based on physical examination findings and diagnostic testing, Dr. O'Brien diagnosed right knee osteoarthritis and degenerative disc disease of the lumbar spine. However, he opined that both of these conditions were not related to the accepted June 25, 2012 employment injury. Dr. O'Brien advised that appellant required further treatment for his back and right knee conditions, specifically that a replacement was likely necessary, but reiterated that these conditions were not causally related to his accepted employment injury.

Appellant subsequently submitted reports dated October 9 and November 20, 2017 from Dr. Mark A. Seldes, a Board-certified family practitioner, who diagnosed lumbar spine degenerative disc disease, bilateral lower extremity radiculopathy, status postoperative left total knee replacement, right knee internal derangement, right knee degenerative arthritis, and right knee joint degenerative medial meniscus. Dr. Seldes opined that appellant's right knee condition was a consequence of the accepted left knee condition.

Dr. Seldes, in a December 11, 2017 report, diagnosed right knee joint anterior cruciate ligament (ACL) partial proximal tear, right knee joint effusion, and right knee medial tibiofemoral joint chondromalacia. He reported that appellant had a preexisting right knee injury from a 1994 motor vehicle accident. Dr. Seldes indicated that appellant had recovered well from that accident as no treatment, surgery, or physical therapy had been required. He opined that after the June 25, 2012 employment injury, appellant relied on his right knee for significant support for about a year and his right knee bore the brunt of the weight due to ongoing left knee joint pain. Dr. Seldes concluded that given appellant's preexisting injury from a 1994 motor vehicle accident, which had appeared to have healed, appellant suffered an aggravation of his preexisting right knee injury. In

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<sup>4</sup> Docket No. 18-1536 (issued June 24, 2019).

addition, he opined that there appeared to be a medial meniscus and posterior horn injury as well as a newer proximal ACL partial tear injury. Dr. Seldes also concluded that appellant's right knee osteoarthritis was a consequence of his accepted left knee conditions.

By decision dated December 28, 2017, OWCP denied appellant's claim for a consequential injury, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's additional diagnosed medical conditions and the accepted June 24, 2012 employment injury. It found that Dr. O'Brien's July 11, 2017 second opinion report represented the weight of the medical opinion evidence.

On January 2, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 30, 2018.

By decision dated July 12, 2018, the hearing representative affirmed the December 28, 2017 decision.

In a report dated July 25, 2018, Dr. Seldes reiterated his examination findings and diagnoses from prior reports. He opined that appellant's left knee, right knee, and low back conditions had worsened. Moreover, as a result of chronic use of his cane, appellant developed a consequential right carpal tunnel syndrome due to compression of his wrist while using the cane to ambulate. Regarding the diagnosis of lumbar radiculopathy, Dr. Seldes explained that appellant injured his lumbar spine attempting to perform physical therapy following his 2013 total left knee replacement surgery. He reviewed and disagreed with Dr. O'Brien's July 21, 2017 report. In support of his disagreement, Dr. Seldes explained that prior to the accepted July 25, 2012 employment injury appellant was able to perform his job and only developed right knee problems following the employment injury. While appellant had a preexisting right knee condition from a 1994 motor vehicle accident, it had completely healed within six months. Dr. Seldes opined that appellant's right knee condition had been aggravated by the June 25, 2012 left knee injury, subsequent delay in treatment, and treatment for the left knee injury. Based on these facts, he concluded that appellant developed consequential right knee joint traumatic advanced osteoarthritis. Dr. Seldes noted in comparing of right knee resonance imagining (MRI) scan taken in 2014 and 2017 show worsening degenerative joint disease.

Appellant, through counsel, appealed to the Board on August 8, 2018. By decision dated June 24, 2019, the Board found a conflict of medical opinion between Dr. Seldes, appellant's treating physician, and Dr. O'Brien, the second opinion physician, regarding whether appellant's diagnosed degenerative disc disease and osteoarthritis of his right knee were consequential to the accepted June 25, 2012 employment injury.<sup>5</sup> The Board set aside the July 12, 2018 decision and remanded the case to OWCP.

During the pendency of appellant's appeal with the Board, OWCP continued to receive medical reports from Dr. Seldes, which reiterated the findings noted in his prior reports.

On October 9, 2019 OWCP referred appellant, along with the medical record, and SOAF, to Dr. Robert B. McShane, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding whether appellant's diagnosed degenerative disc disease and

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<sup>5</sup> *Id.*

osteoarthritis of his right knee were consequential to the accepted June 25, 2012 employment injury.

In an October 28, 2019 report, Dr. McShane described the history of appellant's June 25, 2012 employment injury, noted his review of the medical record and SOAF, and related appellant's bilateral knee and low back complaints. Upon physical examination, he found that appellant was morbidly obese, and noted that he ambulated with use of a cane in his right hand and a brace on his left leg. Dr. McShane reported a moderately antalgic gait and some difficulty walking. Range of motion for the back revealed 60 degrees forward flexion, 20 degrees extension, 30 degrees side-to-side bending, and no obvious spasm. An examination of the left leg revealed 2 to 110 degrees range of motion with the brace loosened, no anterior or posterior instability, and no obvious left leg muscle atrophy. Dr. McShane reported 0 to 110 degrees right leg range of motion, no obvious instability, mild varus deformity, and stable collaterals and cruciates. He noted that x-rays of the knees and back revealed cemented total left knee arthroplasty in good position with no evidence of wear or loosening, right knee end-stage medial and patellofemoral degenerative changes with varus deformity, and mild-to-moderate lumbar degenerative changes. Dr. McShane opined that appellant's right knee and back conditions were unrelated to the accepted June 25, 2012 employment injury. He indicated that appellant's right knee condition was due to multiple factors such as appellant's morbid obesity, and his preexisting right knee condition. Dr. McShane also related that he could not find records substantiating appellant's complaint that he injured his back during physical therapy after his total right knee arthroplasty in 2013. He disagreed with Dr. Seldes as to whether appellant placed more weight on the right leg during convalescence as it had been his experience that patients placed 100 percent of their weight on each leg while ambulating. Dr. McShane attributed appellant's right knee problems to his significant preexisting osteoarthritis, as shown on x-ray, and morbid obesity and unrelated to the accepted June 25, 2012 employment injury. He also found no evidence supporting a back condition due to the accepted June 25, 2012 employment injury. Dr. McShane noted his agreement with Dr. O'Brien regarding whether the right knee and low back conditions had been caused or aggravated by the accepted June 25, 2012 employment injury.

By decision dated November 15, 2019, OWCP denied expansion of the acceptance of appellant's claim to include consequential conditions of lumbar spine degenerative disc disease and right knee osteoarthritis.

Reports dated November 21, December 23, 2019, January 30, February 25, March 23, 2020 from Dr. Seldes were unchanged from his prior reports.

On November 25, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 11, 2020.

By decision dated April 16, 2020, OWCP's hearing representative affirmed the November 15, 2019 decision.

In reports dated April 30, 2020, Dr. Seldes noted his review of the medical record and provided examination findings. Diagnoses were unchanged from prior reports. Dr. Seldes noted his agreement with Dr. McShane regarding the diagnosis of right knee preexisting osteoarthritis, but disagreed that the accepted employment injury had not caused or aggravated this condition. Thus, he opined that OWCP should accept the condition of aggravation of preexisting right knee osteoarthritis. Next, Dr. Seldes noted that prior to physical therapy notes for the June 25, 2012

employment injury appellant did not note diagnoses of lumbar radiculopathy or herniated disc. He also opined that Dr. McShane's opinion should not be accorded more weight than his opinion, as he was appellant's treating physician.

Dr. Seldes, in reports dated May 22, June 23, July 23, and August 19, 2020, detailed examination findings and again opined that appellant sustained consequential right knee and low back conditions.

On July 30, 2020 appellant, through counsel requested reconsideration of the April 16, 2020 decision.

By decision dated September 10, 2020, OWCP denied modification.

### **LEGAL PRECEDENT**

Where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>6</sup>

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.<sup>7</sup> A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.<sup>8</sup> Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment factor(s) identified by the claimant.<sup>9</sup>

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.<sup>10</sup> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>11</sup> With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though

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<sup>6</sup> *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *T.B.*, *id.*; *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> *T.B.*, *id.*; *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *T.B.*, *id.*; *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>10</sup> *T.B.*, *id.*; *C.W.*, Docket No. 18-1536 (issued June 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *Albert F. Ranieri*, 55 ECAB 598 (2004); *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

<sup>11</sup> *R.M.*, Docket No. 18-1621 (issued August 23, 2019); *Debra L. Dilworth*, 57 ECAB 516 (2006).

nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.<sup>12</sup>

Section 8123(a) of FECA 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.<sup>13</sup> The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual and medical background, must be given special weight.<sup>15</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a medical condition consequential to the accepted June 25, 2012 employment injury.

OWCP determined that a conflict in the medical opinion evidence was created between Dr. Seldes, appellant's treating physician, who opined that appellant's diagnosed right knee and lumbar conditions should be accepted as consequential injuries from the June 25, 2012 employment injury, and Dr. O'Brien, OWCP's second opinion physician, who concluded that there was no medical evidence to support any causal relationship between the June 25, 2012 employment injury and any right knee or lumbar conditions. OWCP properly referred appellant to Dr. McShane for an impartial medical examination in order to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

In an October 28, 2019 report, Dr. McShane, noted his review of the SOAF and the medical record. Upon examination, he noted that appellant was morbidly obese, ambulated using a cane and observed moderately antalgic gait, some difficulty walking, no right leg obvious instability, mild right knee varus deformity, stable right collaterals and cruciate. Dr. McShane noted that x-rays of the knees and back revealed cemented total left knee arthroplasty in good position with no evidence of wear or loosening, right knee end-stage medial and patellofemoral degenerative changes with varus deformity, and mild-to-moderate lumbar degenerative changes. He opined that the right knee and back conditions were unrelated to the accepted June 25, 2012 employment injury. Dr. McShane related that appellant's conditions were due to other multiple factors including appellant's morbid obesity, and a preexisting right knee condition. He also noted that

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<sup>12</sup> *K.C.*, Docket No. 19-1251 (issued January 24, 2020); *R.V.*, Docket No. 18-0552 (issued November 5, 2018); *L.S.*, Docket No. 08-1270 (issued July 2, 2009).

<sup>13</sup> 5 U.S.C. § 8123(a).

<sup>14</sup> 20 C.F.R. § 10.321.

<sup>15</sup> *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

appellant's physical therapy notes did not substantiate his complaints of a consequential lumbar condition.

Dr. McShane accurately described the employment injury and noted his review of the medical record, including the SOAF. He performed a thorough, clinical examination and provided findings on examination. The Board, therefore, finds that Dr. McShane's opinion is entitled to the special weight accorded an impartial medical examiner with regard to the issue of whether the acceptance of appellant's claim should be expanded to include consequential right knee and lumbar conditions.<sup>16</sup>

The Board finds the reports from Dr. Seldes submitted following Dr. McShane's report, are insufficient to overcome the special weight accorded to Dr. McShane because reports from a physician who was on one side of a medical conflict resolved by an IME are insufficient to overcome the special weight accorded the report of the IME or create a new conflict.<sup>17</sup>

As the medical evidence of record is insufficient to establish that appellant sustained consequential right knee and lumbar conditions causally related to the accepted June 25, 2012 employment injury, the Board finds that appellant has not met his burden of proof.

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 not met his burden of proof to establish a medical condition consequential to the accepted June 25, 2012 employment injury.

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<sup>16</sup> See *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *M.M.*, Docket No. 16-1655 (issued April 4, 2018); *D.G.*, Docket No. 17-0608 (issued March 19, 2018).

<sup>17</sup> *R.M.*, Docket No. 20-1268 (issued February 24, 2021); *D.M.*, Docket No. 17-1992 (issued September 12, 2018); *S.F.*, Docket No. 17-1427 (issued May 16, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 10, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board