

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

D.C., Appellant)	
)	
and)	Docket No. 23-0455
)	Issued: August 28, 2023
U.S. POSTAL SERVICE, CHESTNUT HILL)	
POST OFFICE, Chestnut Hill, MA, Employer)	
)	

Appearances: *Case Submitted on the Record*
John L. DeGeneres, Jr., Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 14, 2023 appellant filed a timely appeal from a December 19, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal

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 an 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.

Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted employment injury; and (2) whether OWCP abused its discretion in denying appellant's request for a subpoena.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 14, 2015 appellant, then a 71-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed accelerated right hip and right knee osteoarthritis due to factors of his federal employment. In a narrative statement, he noted his letter carrier duties beginning in 1986. Appellant reported that he underwent right knee arthroscopic surgery on January 5, 1999 and that in 2009 he began experiencing right knee pain when walking and standing. He related that he began having right hip pain in 2004, and on January 12, 2006 he underwent a right hip replacement.

In a February 7, 2015 report, Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon, noted appellant's medical and surgical history, his description of job duties, and his complaints of right hip and right knee pain and stiffness. He reviewed medical reports of record, including a September 18, 2013 right knee x-ray showing degenerative changes, and reported physical examination findings. Dr. Hartunian diagnosed status post right total hip replacement for end-stage degenerative arthritis with secondary surgery needed to treat heterotopic bone formation, which resulted in severe right hip mobility restriction, and degenerative right knee arthritis with one millimeter (mm) of cartilage interval at the medial femorotibial joint. He opined that appellant's regular job duties of constant and repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting exerted repeated stress to his lower extremities causing chronic inflammation that accelerated articular cartilage loss and contributed to the development and progression of his right lower extremity arthritis.

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because it would assist the Board in rendering a decision that will promote uniformity and fairness in the adjudication of this case and other similar cases before the Board. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

⁴ Docket No. 20-1219 (issued June 16, 2021).

A notice dated April 20, 2015 indicated that appellant was retiring from the employing establishment, effective May 29, 2015.

On June 30, 2015 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant's right hip and right knee conditions were causally related to his work activities. In an August 4, 2015 report, Dr. Geary noted his review of the medical record and appellant's description of his work and medical history. He also related appellant's physical examination findings. Dr. Geary opined that appellant's right hip and right knee conditions were not related to his work activities, but rather to chronic degenerative osteoarthritis. He advised that the work activities would have caused a temporary aggravation of both conditions that would have ceased one or two months after he ceased all work activities. Dr. Geary opined that there was no causation or acceleration due to appellant's work and that, while the right total hip arthroplasty was necessary given appellant arthritis, it was not due to his federal work activities. He concluded that appellant suffered from chronic degenerative osteoarthritis that was an underlying condition and not due to his work activities.

By decision dated August 17, 2015, OWCP accepted temporary aggravation of right hip osteoarthritis, resolved July 29, 2015, and temporary aggravation of right knee osteoarthritis, resolved July 29, 2015.

On September 4, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated November 30, 2015, OWCP's hearing representative reversed the August 17, 2015 decision. She found that a conflict in the medical evidence existed between the opinions of Dr. Hartunian, appellant's physician, and Dr. Geary, OWCP's referral physician, regarding whether the accepted aggravations of appellant's right hip and right knee osteoarthritis were temporary or permanent.

On March 24, 2016 OWCP referred appellant to Dr. John H. Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation. In an April 27, 2016 report, Dr. Chaglassian discussed appellant's medical history and noted his complaints of intermittent right knee swelling and intermittent right hip pain. He noted that the right knee examination demonstrated no effusion, redness, or heat, but also showed synovial hypertrophy and varus deformity without ligamentous instability or abnormal patellar tracking. The neurovascular examination of appellant's right knee was normal. Dr. Chaglassian indicated that the right hip examination demonstrated no tenderness and discomfort with flexion to 90 degrees. He advised that appellant reported that he did not sustain a specific work injury and opined that he had a predisposition for progressive arthritis in the joints that was not work related. Dr. Chaglassian continued that, although appellant's total hip replacement was reasonable and necessary, it was not due to his federal job duties. He concluded that appellant might have sustained a temporary aggravation of his right hip and right knee arthritis related to work, but this condition would have ceased a few months after he stopped work.

By decision dated May 9, 2017, OWCP found that the special weight of the medical opinion evidence rested with the opinion of Dr. Chaglassian and reiterated that the accepted

conditions were temporary aggravations of right hip and right knee osteoarthritis, resolved January 29, 2015.

On May 30, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on October 25, 2017. By decision dated February 5, 2018, OWCP's hearing representative set aside the May 9, 2017 decision and remanded the case to OWCP for further development, to be followed by a *de novo* decision. The hearing representative directed OWCP to obtain a supplemental opinion from Dr. Chaglassian regarding whether the work-related aggravation of appellant's right hip and right knee osteoarthritis was temporary or permanent.

On March 1, 2018 OWCP asked Dr. Chaglassian to furnish a supplemental report. It enclosed the original case record, a SOAF dated February 27, 2018, that included the accepted conditions of temporary aggravation of right hip and right knee osteoarthritis, and a description of appellant's job duties.

In a May 17, 2018 report, Dr. Chaglassian noted his April 27, 2016 evaluation. He opined that the medical literature did not support that an individual was more likely to develop arthritis because of performing a certain job such as a letter carrier. Dr. Chaglassian indicated that appellant did not report that he had sustained direct hip or knee injuries and opined that the need for total hip replacement was primarily related to progressive arthritis and not because of appellant's work duties as a letter carrier. He advised that he was in agreement with Dr. Geary. Dr. Chaglassian opined the fact that a temporary aggravation was accepted did not alter his opinion that the temporary aggravation of arthritis in the right hip and right knee related to appellant's work would have ceased when he retired and was not a permanent aggravation.

By decision dated May 23, 2018, OWCP found that appellant had not established permanent aggravation of right hip and right knee osteoarthritis. It found that the special weight of the medical opinion evidence rested with the opinion of Dr. Chaglassian.

On June 5, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 29, 2018. Following the hearing, appellant submitted a May 3, 2018 report in which Dr. Justin Kung, a Board-certified radiologist, noted his review of an April 23, 2018 right knee x-ray. Dr. Kung indicated that the testing demonstrated that the right medial compartment space interval measured 0.0 mm, with bone-on-bone contact and subchondral sclerosis, and that the lateral compartment joint space interval measured 9.0 mm. He noted tricompartmental osteophytes and concluded that there was severe degenerative change in the right knee medial compartment.

By decision dated February 5, 2019, OWCP's hearing representative set aside the May 23, 2018 decision, finding that Dr. Chaglassian's opinion was not supported by probative medical rationale. She remanded the case for OWCP to ask Dr. Chaglassian for a well-reasoned explanation as to how and why appellant's work activities were insufficient to result in a permanent aggravation of his right hip and right knee arthritis. If Dr. Chaglassian was unwilling to provide a sufficient response, she indicated a new impartial medical examination should be scheduled.

On February 20, 2019 OWCP asked Dr. Chaglassian to provide a supplemental report. In a March 6, 2019 response, Dr. Chaglassian referred to his May 17, 2018 report. He indicated that arthritis was not caused by professions, which involved prolonged standing, bending, lifting, getting in and out of trucks, or driving trucks, and noted that it was unknown why some people got arthritis. Dr. Chaglassian opined that there was no work-related progression or temporary aggravation related to appellant's employment duties.

By *de novo* decision dated July 17, 2019, OWCP reiterated that appellant had only established temporary aggravation of right hip and right knee osteoarthritis, resolved on July 29, 2015.

On July 23, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On August 21, 2019 counsel requested subpoenas for Dr. Geary and Dr. Chaglassian or that they be asked additional questions, which he provided. In correspondence dated September 16, 2019, OWCP's hearing representative denied the request for issuance of subpoenas. A hearing was held on October 22, 2019.

By decision dated December 2, 2019, OWCP's hearing representative affirmed the July 17, 2019 decision. The hearing representative formally denied appellant's request for subpoenas and found that the medical evidence of record was insufficient to establish that he sustained a permanent aggravation or acceleration of right knee or hip osteoarthritis.

On February 21, 2020 appellant, through counsel, requested reconsideration and submitted evidence previously of record.

By decision dated May 21, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant, through counsel, appealed to the Board and, by decision dated June 16, 2021,⁵ the Board set aside the December 2, 2019, and May 21, 2020 decisions and remanded the case to OWCP for further development. The Board found that Dr. Chaglassian's opinion failed to acknowledge OWCP's prior determination that the accepted employment factors were sufficient to cause an aggravation of appellant's right hip and right knee osteoarthritic conditions. The Board therefore determined that his opinion was of diminished probative value regarding whether appellant sustained a work-related permanent aggravation of his right hip and right knee conditions and, thus, was insufficient to carry the special weight of the medical opinion evidence regarding appellant's expansion claim. Due to the remaining conflict in medical opinion evidence, the case was remanded by the Board for a new impartial medical examination, to be followed by a *de novo* decision.

On October 5, 2021 OWCP referred appellant and the case record, along with a series of questions and a SOAF, to Dr. James Nairus, Board-certified in orthopedic surgery, for an impartial medical examination and evaluation regarding whether appellant sustained a work-related permanent aggravation of his right hip and right knee conditions.

⁵ *Id.*

In an October 25, 2021 report, Dr. Nairus discussed appellant's factual and medical history and advised that he examined appellant on that date. He indicated that degenerative arthritis can be temporarily aggravated by repetitive activities or weather. Dr. Nairus noted that a permanent aggravation might result from a specific injury causing structural damage, but opined that this did not occur in appellant's case. He explained that appellant's repetitive work duties had caused a temporary increase in symptoms of the preexisting condition and noted that appellant had not sustained any structural damage to the knee. Dr. Nairus opined that appellant's repetitive work as a letter carrier just caused a temporary aggravation of his preexisting degenerative arthritis in his right hip and right knee and caused an increase in his symptoms for a limited period of time without giving him any greater impairment that existed prior to his employment. He indicated that he agreed with Dr. Geary and Dr. Chaglassian that the temporary aggravation of appellant's right knee and right hip conditions would have only required two months of conservative treatment before returning to their baseline conditions accompanied "with the natural progression of degenerative arthritis that is known to occur with time."

Dr. Nairus noted that he did not believe, based on the FECA definition of causation, that appellant's work as a letter carrier caused a permanent aggravation as he did not believe "that his work activities caused the condition that materially worsened such that it would not refer back to its previous level of severity." He further opined that he did not believe that appellant's work as a letter carrier caused any acceleration of his right knee and right hip conditions. Dr. Nairus also indicated that the x-rays demonstrated the progression of arthritis which occurred with nonwork-related degenerative arthritis and noted that no images showed any structural damage "as occurring with any specific work injury or work activity." He opined that the studies demonstrated the ordinary progression of arthritis indicating that appellant's work duties did not cause any material changes. Dr. Nairus noted that serial x-rays revealed gradual progression of arthritis, which continued after appellant stopped work in 2015 and posited that this finding was another reason to conclude that appellant's work duties caused a temporary aggravation rather than a permanent aggravation.

By decision dated May 12, 2022, OWCP found that appellant had not established permanent aggravation of right hip and right knee osteoarthritis. It found that the special weight of the medical opinion evidence rested with the opinion of Dr. Nairus, the IME.

On May 20, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. On June 17, 2022 counsel requested a subpoena for Dr. Nairus or that he be asked additional questions, which he provided. In correspondence dated September 7, 2022, OWCP's hearing representative denied the request for issuance of a subpoena. A hearing was held on October 12, 2022.

By decision dated December 19, 2022, OWCP's hearing representative affirmed the May 12, 2022 decision. The hearing representative formally denied appellant's request for a subpoena of Dr. Nairus and found that the medical evidence of record was insufficient to establish that appellant sustained a permanent aggravation or acceleration of right knee or hip osteoarthritis.

LEGAL PRECEDENT

When 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.⁶ The medical evidence required to establish causal relationship between a specific condition, and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.⁷

The Board has held that when the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.⁸ However, the normal progression of untreated disease cannot be stated to constitute “aggravation” of a condition merely because the performance of normal work duties reveals the underlying condition.⁹

Section 8123(a) of FECA provides that 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 IME) who shall make an examination.¹⁰ For a conflict to arise, the opposing physicians’ opinions must be of virtually equal weight and rationale.¹¹ In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

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

OWCP properly referred appellant for an impartial medical examination and evaluation regarding whether appellant sustained a work-related permanent aggravation of his right hip and

⁶ *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *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).

⁷ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁸ *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹¹ *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹² *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

right knee conditions.¹³ In an October 25, 2021 report, Dr. Nairus discussed appellant's factual and medical history and advised that he examined appellant on that date. He noted that a permanent aggravation might result from a specific injury causing structural damage, but opined that this did not occur in appellant's case. Dr. Nairus opined that appellant's repetitive work as a letter carrier just caused a temporary aggravation of his preexisting degenerative arthritis in his right hip and right knee and caused an increase in his symptoms for a limited period of time without giving him any greater impairment that existed prior to his employment. He indicated that he agreed with Dr. Geary and Dr. Chaglassian that the temporary aggravation of appellant's right knee and right hip conditions would have only required two months of conservative treatment before returning to their baseline conditions accompanied "with the natural progression of degenerative arthritis that is known to occur with time."

The Board notes that Dr. Nairus indicated in his October 25, 2021 report that he conducted a physical examination of appellant on that date. However, he did not provide any findings of such a physical examination in his report. Although Dr. Nairus provided a discussion regarding whether appellant sustained a permanent aggravation of his right hip and right knee osteoarthritic conditions, he did not explain how this discussion was supported by findings of his physical examination conducted on October 25, 2021. His opinion is incomplete in the absence of these physical examination findings and his explanation of how they would inform his opinion on the extent of the aggravation of appellant's right hip and right knee conditions.

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁴ For the above-described reasons, the opinion of Dr. Nairus is in need of clarification and elaboration. Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to OWCP for referral of the case record, a SOAF, and, if necessary, appellant, to Dr. Nairus for a supplemental report regarding whether appellant sustained a permanent aggravation of his right hip and right knee osteoarthritic conditions. This report should include any physical examination findings obtained by Dr. Nairus, and his explanation of how they would inform his opinion on this underlying issue of the present case. If Dr. Nairus is unable to elaborate on his physical examination findings, OWCP must submit the case record and a detailed statement of accepted facts to a new IME for the purpose of obtaining his or her rationalized medical opinion on the issue.¹⁵ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁶

¹³ See *supra* notes 10 and 11.

¹⁴ *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *James P. Roberts*, *supra* note 12; *April Ann Erickson*, 28 ECAB 336 (1977).

¹⁵ See generally, *M.C.*, Docket No. 22-1160 (issued May 9, 2023); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹⁶ In light of the Board's finding in Issue 1, Issue 2 is rendered moot.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 28, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board