

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

C.W., Appellant)	
)	
and)	Docket No. 23-0239
)	Issued: October 10, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, FEDERAL AIR)	
MARSHAL SERVICE, Orlando, FL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 7, 2022 appellant, through counsel, filed a timely appeal from a November 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal 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

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the November 22, 2022 decision, OWCP received additional evidence. 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish expansion of the acceptance of the claim to include additional conditions as causally related to, or a consequence of, the accepted June 25, 2012 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decisions 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 his knee hit the pavement as he knelt down to shoot at a firing range while in the performance of duty. OWCP accepted the claim for left knee contusion. It later expanded the acceptance of appellant's claim to include left knee primary osteoarthritis 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.

OWCP referred appellant to Dr. Jeffrey T. O'Brien, a Board-certified orthopedic surgeon selected as a second opinion physician, to determine the extent and degree of any employment-related disability.

In a report dated July 11, 2017, Dr. O'Brien noted that appellant complained of back and right knee pain. Based on physical examination findings and diagnostic testing, he diagnosed right knee osteoarthritis and degenerative disc disease of the lumbar spine. However, Dr. O'Brien opined that these conditions were not related to the accepted June 25, 2012 employment injury. He advised that appellant required further treatment for his back and right knee conditions, specifically that a knee replacement was likely necessary, but reiterated that these conditions were not causally related to his accepted employment injury.

Appellant subsequently submitted October 9 and November 30, 2017 reports 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 conditions were 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

⁴ Docket No. 18-1536 (issued June 24, 2019); Docket No. 21-0017 (issued December 28, 2021).

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 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 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 3, 2018 appellant, through counsel, requested an oral 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, OWCP's hearing representative affirmed the December 28, 2017 decision.

In a report dated July 25, 2018, Dr. Seldes reiterated his prior examination findings and diagnoses and opined that appellant's left knee, right knee, and low back conditions had worsened. He further opined that, as a result of chronic use of his cane, appellant developed 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 disagreed with Dr. O'Brien's July 21, 2017 report, explaining that appellant was able to perform his job prior to the accepted July 25, 2012 employment injury, 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 magnetic resonance imaging (MRI) scans taken in 2014 and 2017 show worsening degenerative joint disease.

Appellant, through counsel, filed an appeal with 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.⁵ 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 a statement of accepted facts (SOAF), to Dr. Robert B. McShane, a Board-certified orthopedic

⁵ Docket No. 18-1536 (issued June 24, 2019).

surgeon, to resolve the conflict in the medical opinion evidence regarding whether appellant's diagnosed degenerative disc disease and 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 appellant was morbidly obese, and noted that he ambulated with use of a cane in his right hand and a left leg brace. Dr. McShane reported a moderately antalgic gait and some difficulty walking. He related appellant's physical examination findings and 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 the 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 preexisting right knee condition. Dr. McShane also related that he could not find records substantiating appellant's complaints 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 place 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.

By *de novo* decision dated November 15, 2019, OWCP denied expansion of the acceptance of appellant's claim to include additional conditions as causally related to, or consequential to, the accepted employment injury.

Reports dated November 21, 2019, through March 23, 2020 from Dr. Seldes were unchanged from his prior reports.

On November 25, 2019 appellant, through counsel, requested an oral 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 a report 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 an aggravation of this condition. Thus, he opined that OWCP should expand the acceptance of appellant's claim to include the condition of aggravation of preexisting right knee osteoarthritis. Dr. Seldes also opined that Dr. McShane's opinion should not be accorded more weight than his own opinion as 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.

Appellant, through counsel, filed an appeal with the Board on October 7, 2020. By decision dated December 28, 2021, the Board affirmed the September 10, 2020 decision.⁶

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.

In a report dated January 7, 2022, Dr. James Caviness, a physician Board-certified in occupational medicine, reviewed the case record on behalf of the employing establishment. He indicated that the medical evidence did not support appellant "being completely off work," and cited the Board's December 28, 2021 Board decision, which affirmed the denial of right knee and lumbar conditions as consequential injuries.

On February 7, 2022 OWCP referred appellant, together with a statement of accepted facts, a series of questions, and the medical record, to Dr. Omar D. Hussamy, a Board-certified orthopedic surgeon, for a second opinion regarding the diagnosis and cause of appellant's claimed conditions, extent of disability, and appropriate treatment recommendations. It requested that he review the January 7, 2022 report of Dr. Caviness.

Dr. Hussamy, in a March 25, 2022 report, noted that he had reviewed the medical reports, including the reports from Dr. Caviness dated February 11, 2021 and January 7, 2022, the SOAF, and a series of questions. He related physical examination findings with regard to appellant's left knee. Based on his review of the medical evidence, Dr. Hussamy agreed with Dr. Caviness that the acceptance of appellant's claim should not be expanded to include lumbar radiculopathy, preexisting obesity, and right knee osteoarthritis. He noted that he disagreed with the opinion of Dr. Caviness regarding appellant's left knee as Dr. Caviness had not physically examined appellant.

In an April 20, 2022 visit note, Dr. Hussamy indicated that appellant was seen for his right knee complaints. He related that appellant had grossly limited range of motion (ROM) of the right knee, with positive medial and lateral McMurray tests, and positive patellar grind tests. Dr. Hussamy diagnosed degenerative right knee joint disease based on appellant's physical examination findings and discussed treatment options with appellant. He concluded that appellant's right knee degenerative joint disease was worsened by his painful left total knee replacement, as a result of him favoring his left knee.

In a June 28, 2022 report requesting expansion, Dr. George Ibraheim, a treating internist specializing in cardiology, noted appellant's history of injury, reviewed medical records, and provided physical examination findings. He diagnosed left knee derangement of the medical meniscus posterior horn, right knee spontaneous disruption of the anterior cruciate ligament, other articular cartilage disorders, and right knee unilateral primary osteoarthritis causally related to the accepted June 25, 2012 employment injury. Dr. Ibraheim explained that following appellant's left knee surgeries he had to use a cane and was unable to place any weight on his left leg, which

⁶ Docket No. 21-0017 (issued December 28, 2021).

caused him to put more pressure on his right leg. Additionally, review of MRI scans revealed a progression of appellant's right knee condition, which Dr. Ibraheim attributed to appellant overcompensating for his left knee injury. Dr. Ibrahim noted that appellant has not had a traumatic right knee injury since 1995. Thus, he concluded that appellant's employment-related conditions included left knee posterior medial meniscus horn derangement, spontaneous disruption of the right knee cruciate ligament, unspecified knee medial collateral ligament sprain, unspecified site other articular cartilage disorders, and right knee primary osteoarthritis.

In a report dated July 26, 2022, Dr. Robert J. Hill, a Board-certified orthopedic surgeon, recounted appellant's history of injury and provided detailed physical examination findings. He diagnosed status post total left knee replacement with unstable functioning knee and compensatory right knee medial meniscal tear. Dr. Hill explained that left knee limitations and instability caused increased right knee symptoms.

On August 24, 2022 appellant, through counsel, requested reconsideration.

By decision dated November 22, 2022, OWCP denied modification.

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.⁷

The claimant bears the burden of proof to establish a claim for a consequential injury.⁸ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, and establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.⁹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by the accepted employment injury, is sufficient to establish causal relationship.¹¹ 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

⁷ *M.B.*, Docket No. 23-1096 (issued March 13, 2024); *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).

⁸ *M.B.*, *id.*; *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *A.H.*, Docket No. 18-1632 (issued June 1, 2020); *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

⁹ *M.B.*, *id.*; *K.W.*, Docket No. 18-0991 (issued December 11, 2018).

¹⁰ *M.B.*, *id.*; *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

¹¹ *Id.*

independent intervening cause attributable to the claimant's own intentional misconduct.¹² 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.¹³

ANALYSIS

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

The Board notes that, with respect to appellant's burden of proof to establish an additional condition causally related to or as a consequence of his accepted June 25, 2012 employment injury, it is unnecessary to consider the evidence that he submitted prior to the issuance of OWCP's September 10, 2020 decision, which was previously reviewed by the Board in its December 28, 2021 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁴

In a March 25, 2022 report, Dr. Hussamy, OWCP's second opinion physician, recounted appellant's June 25, 2012 employment injury history and reviewed the medical evidence of record. He related extensive physical examination findings regarding appellant's left knee. Based on his review of the medical evidence, Dr. Hussamy agreed with Dr. Caviness that the acceptance of appellant's claim should not be expanded to include lumbar radiculopathy, preexisting obesity, and right knee osteoarthritis. However, he failed to provide rationale explaining his conclusory opinion.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁵ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁶ Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁷ Accordingly, as OWCP undertook development of the evidence by referring appellant to a second opinion physician, it has a duty to secure an appropriate report addressing the relevant issues.¹⁸

On remand OWCP shall request a supplemental opinion from Dr. Hussamy. If Dr. Hussamy is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with an updated SOAF and a series of questions, to a new second opinion

¹² *T.S.*, Docket No. 23-0174 (issued June 23, 2023); *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004).

¹³ *Id.*

¹⁴ *L.G.*, Docket No. 21-0770 (issued October 13, 2022); *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹⁵ *See M.T.*, Docket No. 19-0373 (issued August 22, 2019).

¹⁶ *See S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹⁷ *See T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁸ *See B.W.*, Docket No. 19-0965 (issued December 3, 2019).

physician in the appropriate field of medicine to address the issue of whether appellant's additional medical conditions are causally related to, or a consequence of, his accepted employment injury.¹⁹

Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 22, 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: October 10, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ See *F.K.*, Docket No. 19-1804 (issued April 27, 2020).