

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

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| E.J., Appellant  | ) |                            |
|  | ) |                            |
| and  | ) | Docket No. 24-0777         |
|  | ) | Issued: September 12, 2024 |
| U.S. POSTAL SERVICE, ROYAL OAK POST<br>OFFICE, Royal Oak, MI, Employer | ) |                            |
|  | ) |                            |

*Appearances:*  
Michelle Hodges, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 19, 2024 appellant, through his representative, filed a timely appeal from a February 26, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the February 26, 2024 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 a left hip condition causally related to the accepted factors of his federal employment.

## **FACTUAL HISTORY**

On January 19, 2021 appellant, then a 46-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a left hip condition due to factors of his federal employment including lifting, bending, twisting, turning, and stooping. He noted that he first became aware of his condition and realized its relation to his federal employment on July 29, 2020. Appellant did not stop work.

In a narrative statement dated January 19, 2021, appellant denied having a history of hip pain and noted that in July 2020, he began experiencing severe pain in his left hip which caused him to seek treatment. He related that his job duties as a full-time letter carrier included repetitive walking, lifting, bending, twisting, turning, and stooping; that he was always a full-time carrier working 40 plus hours per week; and that he was subjected to all types of terrain from concrete-to-sand, to mud, from hilly to flat grounds, rugged rock filled paths, or normal downtown street sidewalks. Appellant alleged that the physical duties of his job for many years caused pain and wear and tear to his hip joint resulting in total hip arthroplasty and hip surgery.

In a January 12, 2021 report, Dr. Donald F. Garver, a Board-certified orthopedic surgeon, noted that appellant was under his care for the past several months. On physical examination, he found that appellant had a significantly worn left hip joint that was a little dysplastic on the basis of the oblong appearance of the femoral head. Dr. Garver related that it was very likely that appellant may have underlying evidence of hip dysplasia, which occurred because there was not a concentric presence of the femoral head inside the acetabulum. He explained that under normal circumstances the hip would probably last into appellant's 60's or 70's, but because of the repetitive cycling of his hip getting in and out of the vehicle, walking thousands of steps every day, going up and down steps, bending and squatting, and moving around, as was necessary for appellant to perform his work duties, he opined that the lateral aspect of the femoral head eventually wore down the articular cartilage so that on the date he saw appellant, July 29, 2020, he had "complete evidence of bone-on-bone contact between the lateral aspect of the acetabulum and the lateral aspect of the femoral head." Dr. Garver noted that because of the mildly dysplastic nature of his femoral head and the excessive day-to-day activities and stress on his hip, it wore out prematurely. He explained that normally appellant would be able to live with the hip anywhere up to 80 years; however, "because of the increased daily activities that were necessitated by his job, this hip wore out 20 years premature to what I expect it normally would have done." Dr. Garver explained that the physiologic mechanism by which this occurred was just the flexion and extension that occurred in the hip joint during daily walking as well as going up and down steps and even bending and turning the hip to get in and out of the vehicle. He explained that this was done in repetitive numbers, much in excess of what would normally be experienced on a daily basis, and that because of the excessive nature of appellant's activities and doing his mail delivery on a daily basis, the excessive wear and tear on his hip joint was many times greater than the average person, thus requiring a total hip arthroplasty in August 2020 at 46 years of age.

On July 6, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Jiab H. Suleiman, an osteopath Board-certified in orthopedic surgery, for a second opinion evaluation.

In an August 2, 2021 report, Dr. Suleiman recounted appellant's history of injury and medical treatment, including a total hip replacement in August 2020. He provided appellant's physical examination findings which included full range of motion (ROM) in his hip and ankle; ambulation without any restriction or assistive devices; hip flexion and extension within normal limits; and full quad strength. Dr. Suleiman also noted that x-rays of the pelvis revealed a well-positioned left hip replacement and anteroposterior (AP) and lateral views of the left hip showed excellent alignment. He opined that based on appellant's hip dysplasia, his job duties did not cause, aggravate, or accelerate his hip deterioration. Dr. Suleiman explained that the natural progression of hip dysplasia was that the hip wore out and required hip replacement, which might last 10, 20 or 30 years. He explained that if appellant had a sedentary job, he would have had the same outcome and opined that appellant's condition was not work related. Dr. Suleiman advised that appellant was not disabled, and no further treatment or restrictions were warranted. He opined that appellant had undergone a hip replacement secondary to hip arthritis that developed because of hip dysplasia and was not caused by his job duties.

By decision dated August 27, 2021, OWCP denied appellant's claim. It found that the medical evidence was insufficient to establish that appellant's hip condition was causally related to the accepted work factors.

On August 26, 2022 appellant requested reconsideration. Counsel argued that a new report from Dr. Garver was sufficient to establish appellant's claim.

In a November 29, 2021 report, Dr. Garver noted that he had reviewed the record and reiterated his opinion that appellant's hip condition was work related. He explained that while the hip would have worn out prematurely due to appellant's hip dysplasia, it would have happened at a much later time and was accelerated by the amount of walking he had to do carrying mail.

On October 25, 2022 OWCP determined that a conflict existed in the medical opinions between Dr. Garver, the treating physician, and Dr. Suleiman, the second opinion physician, regarding whether appellant's hip dysplasia was causally related to factors of his federal employment.

On December 7, 2022 OWCP referred appellant, the medical record, the SOAF, and a series of questions to Dr. Jeffrey Devitt, Jr., a Board-certified orthopedic surgeon, serving as an impartial medical examiner (IME), for a medical examination to resolve the conflict in the medical opinion evidence.

In a January 31, 2023 report, Dr. Devitt noted appellant's history of injury and treatment, and provided physical examination findings. He found that appellant's left hip had 30 degrees of internal and external rotation in the seated position; there was 5/5 hip flexion, hip abduction, and knee extension; the left hip was not tender laterally; and appellant's gait was normal. Dr. Devitt noted that he had not seen appellant's pre hip replacement x-rays to assess the degree of dysplasia. He noted Dr. Garver's opinion regarding increased activity and acceleration of arthritis formation and symptoms but opined that appellant's hip dysplasia "was highly likely to develop degenerative

changes and arthritis” and the effect of his job would be very difficult to quantify. Dr. Devitt concluded, “The bottom line in my opinion is there is no clear answer to how much his work duties contributed to his progression of hip arthritis[,] but I will state that it is possible that his overall work activity could have either accelerated his hip arthritis development or made his hip more symptomatic than it would have been if he had a less active job.”

In letters dated March 31, May 22, and August 23, 2023, OWCP requested that Dr. Devitt clarify his opinion as it was speculative.

In a January 4, 2024 report, Dr. Devitt reiterated his opinion that appellant had hip dysplasia and degenerative arthritis of the left hip and that these conditions were not causally related to factors of his employment. He explained that “hip dysplasia is thought to have caused degenerative arthritis which is a problem that develops over time,” and which “is thought to not be directly related to a specific work event.”

By decision dated February 26, 2024, OWCP denied appellant’s claim, finding that the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the accepted employment factors. It accorded the special weight of the evidence to the IME, Dr. Devitt.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>5</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which

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<sup>4</sup> *Id.*

<sup>5</sup> *See S.F.*, Docket No. 23-0264 (July 5, 2023); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>6</sup> *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is casually related to the identified employment factors.<sup>8</sup>

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>9</sup> The opinion of the physician must be based upon a complete factual and medical background, 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 identified employment factors.<sup>10</sup>

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.<sup>11</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>12</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>13</sup> Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>14</sup>

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in medical opinion, and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.<sup>15</sup> If the IME

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<sup>8</sup> *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

<sup>9</sup> *I.J.*, Docket No. 19-1343 (issued February 26, 2020); *T.H.*, 59 ECAB 388 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>10</sup> *D.C.*, Docket No. 19-1093 (issued June 25, 2020); see *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

<sup>12</sup> 5 U.S.C. § 8123(a). See *J.J.*, Docket No. 23-0440 (issued December 21, 2023); *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

<sup>13</sup> See *M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>14</sup> See *T.K.*, Docket No. 22-0334 (issued July 13, 2022); *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

<sup>15</sup> *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

is unable to clarify or elaborate on his original report, or if his supplemental report is vague, speculative, or lacking in rationale, OWCP shall refer appellant to a new IME.<sup>16</sup>

### ANALYSIS

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

OWCP properly determined that a conflict in medical opinion existed between Dr. Garver, the treating physician, and Dr. Suleiman, the second opinion physician, regarding whether appellant's left hip condition was caused by the accepted factors of his federal employment. It properly referred appellant to Dr. Devitt for an impartial medical examination to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a).

In his January 31, 2023 report, Dr. Devitt opined that appellant's preexisting hip dysplasia was "highly likely" to develop degenerative changes and arthritis and the effect of his job would be very difficult to quantify. However, he also opined that while there was no clear answer to how much appellant's work duties contributed to his progression of hip arthritis, it was possible that his overall work activity could have either accelerated his hip arthritis development or made his hip more symptomatic than it would have been if he had a less active job. In a January 4, 2024 supplemental report, Dr. Devitt related that appellant's preexisting hip dysplasia caused degenerative arthritis which was "thought" to develop over time, and which "is thought to not be directly related to a specific work event." His opinion was, therefore, speculative and lacked medical rationale to explain whether or not appellant's work duties had caused, accelerated, precipitated, or aggravated his hip condition, as he initially suggested was possible in his January 31, 2023 report. The Board has held that the opinion of a physician regarding causal relationship must not be speculative or equivocal.<sup>17</sup> As well, the Board has held that when an IME fails to provide medical reasoning to support his conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.<sup>18</sup> The Board thus finds that the conflict in medical opinion between the treating and second opinion physicians remains unresolved.

Therefore, in order to resolve the conflict in medical opinion evidence, the Board shall remand the case for OWCP to obtain an opinion from a new IME. OWCP shall refer appellant, along with the case record and a detailed SOAF for the purpose of obtaining his or her rationalized medical opinion on the issue.<sup>19</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>16</sup> See *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *M.S.*, Docket No. 18-1228 (issued March 8, 2019); *R.H.*, Docket No. 17-1903 (issued July 5, 2018); *Harold Travis, id.*

<sup>17</sup> *P.W.*, Docket No. 20-0407 (issued July 17, 2020); *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>18</sup> *R.G.*, Docket No. 21-0812 (issued February 28, 2022); *K.C.*, Docket No. 19-1251 (issued January 24, 2020).

<sup>19</sup> *T.H.*, Docket No. 21-0207 (issued December 22, 2021); *R.H.*, Docket No. 17-1903 (issued July 5, 2018).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2024 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: September 12, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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