

File Number:
HR10-D-H

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045
Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on _____ As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Electronically signed,

Hearing Representative

PAUL H FELSER
FELSER LAW FIRM, P. C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

Washington DC, October 30, 2017

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of
Claimant; Employed by the ; Case No.
Telephonic Hearing was held on.*

The issue for consideration is whether the total knee replacement should be approved.

The claimant, born , has been employed with the as an education services specialist. She sustained an injury in the performance of her duties on when she fell in a parking lot onto her right leg. The record indicates that the claimant was on travel duty at the time of the injury. She filed a timely workers' compensation claim, and the District Office of Workers' Compensation accepted the claim for unspecified internal derangement of right knee. The Office also accepted chondromalacia of the right knee, ankylosis of the right knee joint, osteoarthritis of the right knee, and derangement of lateral meniscus, right. The Office authorized right knee arthroscopic surgery.

The claimant wrote that when she fell there was snow and ice on the ground and she fell onto the pavement, onto her right knee. On the claimant underwent surgery to the right knee. Dr. MD, Board-certified orthopedic surgeon, performed arthroscopic chondroplasty, medial femoral condyle, and arthroscopic microfracture, lateral tibial plateau.

Of record is the claimant's position description. It indicates that the job is primarily sedentary with some walking, standing, bending and carrying of relatively light items such as paper and books. According to the description, no special physical demands were required, and the job required 40% to 50% travel in the United States.

Eventually Dr. requested approval for total knee replacement. Following development of the claim the Office denied approval on

A review of the medical evidence of record follows.

The claimant had emergency care at White Plains Hospital Center for contusions¹. The report contains no history or findings. Dr. MD, treated the claimant on . He noted that the claimant fell on onto concrete. A right knee MRI scan showed osseous contusion involving the posterior aspect of the medial plateau; possible small non-displaced fracture; suggestion of horizontal tear through the posterior horn and a potential tear of the lateral meniscus; mild degenerative changes. The report describes a fall occurring on On Physician's Assistant reported that a CT scan showed nondisplaced fracture posterior medial plateau. Dr. diagnosed internal derangement of the right knee on . Dr.

¹The documentation does not state the date of examination.

subsequently noted that the claimant had no prior problems with the right knee. He recommended surgery.

On [redacted] Dr. [redacted] performed right knee arthroscopic chondroplasty, medial femoral condyle; and arthroscopic microfracture, lateral medial plateau. He continued to follow the claimant during recovery. On [redacted] he reported that the right knee was benign. On [redacted] Dr. [redacted] reported that x-rays showed slight narrowing of the knee, particularly in the lateral compartment. He stated that the claimant had articular cartilage partial loss in the medial and lateral compartment.

[redacted] examined the claimant on [redacted]. She noted that the claimant was still having pain in the right knee. She reported that x-rays showed moderate medial compartment joint space loss. On [redacted]

Dr. [redacted] reported minimal discomfort in the right knee. He stated that the claimant was diagnosed with medial compartment arthritis.

Dr. [redacted] next saw the claimant on [redacted]. He stated that the claimant related an increase in pain three weeks earlier. He subsequently performed injections. He stated on [redacted] and through [redacted] that the right knee was benign. On [redacted] the claimant again presented with right knee pain; and on [redacted] the claimant presented with right knee pain.

Ms. [redacted] examined the claimant on [redacted]. She reported no significant change in x-ray since [redacted]. A series of injections was again performed.

On [redacted] Dr. [redacted] reported that x-rays showed arthritic spurring in the lateral femoral condyle. Another series of injections was performed, with another series performed in [redacted].

Upon examination on [redacted] Dr. [redacted] reported that the claimant had a mild to moderate valgus deformity. The claimant was again examined on [redacted] and more injections were performed. On [redacted] Dr. [redacted] recommended knee replacement.

The Office's District Medical Advisor (DMA) reviewed the record on [redacted]. She opined that the need for replacement surgery was not related to the effects of the [redacted] work injury. She stated that the claimant "fell on snow," and noted that she was treated conservatively. She observed that the MRI indicated that arthritic changes in three compartments were already present at the time of the injury. She explained her opinion:

"The patient had pre-existing arthritis and the fall did not cause the cartilage defects present as she already had underlying arthritis. The fall could aggravate underlying arthritis, but again, a single ground level fall in a 4'11" person onto snow would be unlikely to cause the grade 2 and 3 cartilage changes. The lateral meniscus injury was a realistic injury from the fall. The menisci were determined to be normal in the operative report. Therefore, the proposed right knee arthroplasty is not causally related to the accepted medical conditions."

On [redacted] the DMA again reviewed the record to include additional evidence. She asserted that her opinion had not changed, again explaining that the conditions stemming from the [redacted] fall did not merit knee replacement. She added the observation that seven years had passed since the injury, yet

there was only mild arthritis. She stated that if the arthritis was due to the injury, there would be progression in a more rapid manner. Finally, she noted that x-rays of the hip showed that the claimant had more significant arthritis in the hip than the knee.

The claimant continued to receive care for the knee with Ms. [REDACTED] and Dr. [REDACTED]. Dr. [REDACTED] averred that right knee replacement was necessary because the claimant had tried every conservative measure without relief. He emphasized that the claimant had no right knee pain prior to her injury.

At the request of the Office, Dr. [REDACTED] MD, Board-certified orthopedic surgeon, examined the claimant on [REDACTED]. In his report to the Office, Dr. [REDACTED] discussed the claimant's history, medical records, and examination findings. He performed x-rays and determined that the claimant had mild to moderate osteoarthritis of the right knee; however, he found that the conditions stemming from the fall were contusion with bone bruise and nondisplaced subchondral fracture of the medial tibial plateau. Like the DMA, he observed that an MRI shortly after the injury showed tricompartmental changes with edema in the medial tibial plateau; with no edema noted in the lateral compartment. He also observed that a subsequent CT scan only showed abnormalities in the posterior aspect of the medial tibial plateau and no changes laterally; and that some edema in the MCL was noted. According to Dr. [REDACTED] this suggested that the claimant's acute injury was primarily to the medial compartment and that operative findings of chondral damage to the lateral tibial plateau were unrelated to the work injury. He reported that current findings were minimal with no instability; mild angular deformity (only slightly more so than the uninjured left leg); no effusion; and no significant x-ray findings. He opined that the replacement knee surgery should not be approved:

“... [REDACTED] work injury resulted in medial compartment injury and was not the proximate cause of her lateral compartment arthritis. Surgery five months after the work injury showed only mild medial tibial plateau chondral change with the primary findings being in the lateral compartment. Her current examination and x-ray findings do not warrant consideration for knee replacement.”

Dr. [REDACTED] also averred that the claimant's findings suggested that there were no sequelae of the work injury.

[REDACTED] and Dr. [REDACTED] continued to treat the claimant, noting that she had ongoing pain.

The claimant's attorney, Paul Felser, requested a hearing on behalf of the claimant. Accordingly a Telephonic Hearing was held on [REDACTED]. Attorney Felser represented the claimant who did not appear for the Hearing. Mr. Felser noted that the MRI of [REDACTED] was taken after the claimant's injury. He also questioned the DMA's intimation that a person of the claimant's stature, falling onto soft snow, would have had minimal impact to the knee. Mr. Felser commented that the claimant fell on pavement. He critiqued the Statement of Accepted Facts on the basis that it did not list all physicians who had treated the claimant. He also objected to the [REDACTED] MRI being cited as the first medical care since the claimant was referred for the procedure. He stated that the claimant first obtained medical care on [REDACTED] at the White Plains facility and commented that this information was provided on the claim form. He added that the claimant's job involves travel; thus there would be more walking than suggested by the Statement. Finally, Mr. Felser argued that the Statement should have said that the claimant fell onto her entire right side. He maintained that as Dr. [REDACTED]'s opinion was not

based on an accurate Statement, his opinion did not carry weight. Mr. Felser averred that the effects of the work injury led to the need for knee replacement surgery.

It was agreed that the record would remain open for 30 days for the submission of additional evidence.

Following the Hearing the claimant submitted a statement. She iterated that she fell on her right side onto the pavement. She also denied that she had arthritis prior to her injury, and the first indication of arthritis was in her post-injury MRI. She also averred that her job required more physical activity than indicated by Dr. _____, particularly with regard to extensive travel.

Also submitted was a report from Dr. _____ dated _____. He noted that when the claimant fell in _____ she fell onto her knee on concrete. He stated that the claimant presented that day with right knee pain. He discussed the findings at the time of his first examination and the test results. According to Dr. _____ the operative treatment showed findings to include a grade III abnormality of the lateral tibial plateau measuring 1.5 cm. Dr. _____ stated that currently the claimant's examination and testing showed overlapping of the tibial eminences on the lateral femoral condyle, symmetrical narrowing of the medial and lateral compartments, and osteophyte formation on the medial femoral condyle. Dr. _____ opined that the claimant's injury in _____ had led to a progression of the claimant's arthritis. He emphasized that he had treated the claimant since the time of the injury. He held that the knee replacement surgery was warranted based on the claimant's symptoms, and that those symptoms were a result of the _____ work injury.

I have carefully evaluated all evidence of record, to include the Hearing testimony and the evidence submitted after the Hearing. I make the following findings.

First, I will address the arguments of Mr. Felser concerning the Statement of Accepted Facts. I observe that the Statement states only that the claimant was initially treated on _____. As noted above the documentation from White Plains had no date. Thus, while I will grant that the Office use of the adverb "initially" does not accord with the information provided on the claim form and by Mr. Felser, I see it as harmless error. Also, as noted above, the records from that visit provided no history or findings. Thus, the initial evidence of record referencing the _____ injury was –as noted by the Office- the MRI report of _____.

Second, the Statement accurately describes the claimant's duties as reported in the official position description, although it failed to note that the claimant travels 40% to 50% of the time. The claimant has presented no evidence that she requires excessive physical activity beyond that of the position description.

Third, although the DMA formed an opinion relying at least in part that the claimant fell onto snow, and citing her short stature, the Statement does not cite the claimant's height or state that she fell on snow. Dr. _____ did not follow the reasoning of the DMA in this manner. Rather he focused on the fact that an MRI taken soon after the injury reflected that arthritis was already present – and clearly not caused by the injury. With regard to progression, Dr. _____ provides a rationalized opinion that the manner of progression did not suggest any relationship to the work injury. He cited the specific records and testing to support his opinion.

Thus I agree with the District Office that the weight of the medical evidence at the time of its decision supported its conclusion.

The claimant has now submitted additional evidence. I find that this new evidence from Dr. [redacted] creates a conflict with Dr. [redacted] that must be resolved by referee examination. Dr. [redacted] has now opined unequivocally that the need for knee replacement stems from a progression of arthritis provoked by the [redacted] work injury. I observe that Dr. [redacted] is also a Board-certified orthopedic surgeon who has treated the claimant since the time of the injury.

Section 8123(a) of the Federal Employees Compensation Act 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.¹ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion or an OWCP medical advisor, 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 specialist and who has no prior connection with the case.²

On remand the Office should add to the Statement of Accepted Facts that the claimant's job requires travel 40% to 50% in the United States; and it should remove the word "initially" as discussed above. Then it should refer the claimant, together with the record and the Statement, to an appropriate Board-certified specialist in accordance with procedures. I observe that not only did Dr. [redacted] find that the surgery should not be approved; he also averred that the injury resolved without sequelae. Therefore, both issues are in conflict and should be addressed by the referee.

When the referee's report is received, and after any further case development that should become necessary, the Office should issue a *de novo* decision.

DATED:
WASHINGTON, DC

Electronically signed,

Hearing Representative
for
Director, Office of Workers'
Compensation Programs

¹ 20 C.F.R. 10.321.