

OWCP accepted the claim for left foot, left ankle and right knee sprains, as well as right patella tendinitis. By decision dated January 5, 2004, it issued a schedule award for a five percent right leg impairment and by decision dated February 8, 2005 issued a schedule award for an additional five percent to the right leg. In a June 21, 2006 decision, the Board found appellant did not have more than a 10 percent right leg permanent impairment. The history of the case as reported in the Board's prior decision is incorporated herein by reference.

In a report dated February 24, 2009, Dr. Daniel Ignacio, a Board-certified physiatrist, provided a history and results on examination. He diagnosed status postsurgery to the right knee, chronic right patellar tendinitis, chronic wasting along the right side secondary to the knee injury, chronic right peroneal neuropathy, chronic regional pain syndrome of the right lower extremities (right patellofemoral dystrophy) and lumbar disc syndrome. As to the lumbar condition, Dr. Ignacio opined that appellant had developed a lumbar disc injury as a consequence of the right knee injury with abnormal gait and chronic right knee pain. By report dated April 14, 2009, he again provided a history and results on examination. Dr. Ignacio opined that appellant's lumbar disc syndrome was consequential to the right knee injury, stating the right knee "has been weak, keeps on giving way and the abnormal gait."

OWCP referred appellant for a second opinion evaluation. In a report dated December 22, 2009, Dr. Kevin Hanley, a Board-certified orthopedic surgeon, provided a history and results on examination.³ He diagnosed patella tendinitis, surgically treated and chronic degenerative disc disease of the lumbar spine. Dr. Hanley opined, "As far as the back is concerned, there is absolutely no evidence whatsoever that the knee condition has in anyway led to the development of degenerative disease in the back." He further stated that "the development of back pain spontaneously during the course of time is not in anyway typically associated with the minor limp such as demonstrated by [appellant]. [Appellant] suffers from a degenerative condition in the lumbar spine and therefore it is not my belief that it is related to any work exposure or her knee injury specifically."

On June 25, 2010 appellant submitted a May 10, 2010 report from Dr. Peter Trent, a Board-certified orthopedic surgeon, who provided a history and results on examination. Dr. Trent stated that appellant had sustained an injury to her lumbar spine as a result of the work accident. He reported that she had a preexisting scoliosis that had been asymptomatic, but was aggravated by the employment injury.

OWCP determined that a conflict in the medical evidence existed, and Dr. Sankara Kothakota, a Board-certified orthopedic surgeon, was selected as a referee physician. In a report dated September 13, 2010, Dr. Kothakota provided a history and results on examination. He stated, "I agree with Dr. Hanley's assessment that [appellant's] back pathology is not consequential to the right knee injuries. Base[d] on the reports I have seen, the back condition did not arise until several years after the original injuries. As a result, I strongly believe it is related to her age and not related to the work[-]related injury." He also stated that he did not believe there was any peroneal nerve entrapment based on the evidence and clinical examination.

³ The second opinion referral was to Dr. Robert Draper. Dr. Hanley is an associate of Dr. Draper and indicated that Dr. Draper had a scheduling conflict.

Dr. Kothakota concluded that the lumbar disc condition was not consequential to the work injury.

In a letter dated September 8, 2011, OWCP requested that Dr. Kothakota provide a supplemental report. It referred to Dr. Ignacio's April 14, 2009 report and requested that Dr. Kothakota provide medical rationale as to whether there was causal relationship between a lumbar disc syndrome and the accepted work injuries.

In a report dated August 12, 2011, Dr. Kothakota indicated that he had reviewed the April 14, 2009 report from Dr. Ignacio. He stated that the findings of Dr. Ignacio:

“[D]o not match the physical exam[ination] I have done in my office. [Appellant] has no peripheral neuropathy. There is no peroneal neuropathy. [Appellant] has no chronic regional pain syndrome. She has no atrophy. I have measured [appellant's] quadriceps both right and left, they are equal. As a result, she has no wasting of the quadriceps muscle. The original work-related injury and [appellant's] back symptoms did not start for several years after the injury to the knee joint and as a result, they were basically age related and no correlation [to] the work-related injury. Basically, work-related injury and back symptoms start about same time or soon after, not several years later.”

Dr. Kothakota stated that he agreed with Dr. Hanley and disagreed with Dr. Ignacio on the issue.

By decision dated March 27, 2012, OWCP determined that appellant had not established a lumbar condition as a consequential injury.⁴

On February 25, 2013 appellant requested reconsideration. She submitted reports from Dr. Ignacio from February 10, 2012 to January 16, 2013. In the January 16, 2013 report, Dr. Ignacio reiterated that appellant had an abnormal gait and a lumbar condition was a consequential injury. In a report dated May 24, 2012, Dr. Mark Klein, a Board-certified neurosurgeon, provided a history and results on examination. He indicated that a lumbar magnetic resonance imaging (MRI) scan dated January 18, 2012 showed degenerative disc disease, facet arthropathy with some foraminal stenosis and levoscoliosis. Dr. Klein stated that appellant's abnormal gait was contributing to her lumbar symptomology. Appellant also resubmitted the May 10, 2010 report from Dr. Trent and a June 18, 2012 report from Dr. Trent with results on examination.

By decision dated March 13, 2013, OWCP reviewed the case on its merits and denied modification. It found that the weight of the evidence was represented by the referee physician.

⁴ The record indicated that OWCP initially issued the decision with a date of February 24, 2011, although the actual date of the decision appeared to be February 24, 2012. The decision was reissued with a March 27, 2012 date, stating that it superseded a February 24, 2011 decision.

LEGAL PRECEDENT

With respect to consequential injuries, it is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁵ 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.⁶ A claimant bears the burden of proof to establish a consequential injury.⁷

FECA provides that, if there is a 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 the examination.⁸ 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 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.⁹

It is well established that, when a case is referred to a referee specialist 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.¹⁰ Rationalized medical evidence is an opinion of reasonable medical certainty that is supported by medical rationale explaining the basis for the opinion.¹¹

ANALYSIS

In the present case, the record established a conflict in the medical evidence with respect to a consequential back condition. Dr. Ignacio, as well as Dr. Trent, provided opinions supporting a lumbar injury as a consequence of the August 9, 2001 employment injury. The

⁵ *Albert F. Ranieri*, 55 ECAB 598 (2004).

⁶ See A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

⁷ See *J.J.*, Docket No. 09-27 (issued February 10, 2009).

⁸ 5 U.S.C. § 8123.

⁹ 20 C.F.R. § 10.321.

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

¹¹ *Id.*

second opinion physician, Dr. Hanley, opined that there was no relationship between a back condition and the employment injury.¹²

To resolve the conflict, appellant was referred to Dr. Kothakota for a referee examination. In reports dated September 13, 2010 and August 12, 2011, Dr. Kothakota provided an unequivocal opinion that the lumbar condition was not a consequence of the August 9, 2001 employment injury. He had a complete background and referred to the medical history, physical examination findings, the nature of the lumbar condition and the lack of a temporal relationship with the employment injury. Dr. Kothakota explained that he felt the lumbar condition was age related and not a consequence of the work injury.

As noted above, a rationalized opinion from a referee physician on the issue presented is entitled to special weight. The Board finds that Dr. Kothakota provided a rationalized medical opinion and his opinion represents the weight of the medical evidence. The additional reports from Dr. Ignacio through January 16, 2013 reiterating his opinion are not sufficient to overcome the weight of the referee opinion.¹³ The May 24, 2012 report from Dr. Klein refers briefly to an abnormal gait contributing to lumbar symptomology, without providing additional explanation or medical rationale on the issue.

The Board accordingly finds that, based on the weight of the medical evidence of record, OWCP properly found appellant had not established a lumbar injury as a consequence of her August 9, 2001 employment injury. The Board notes that on appeal, appellant submitted a July 31, 2013 report from Dr. Ignacio. Pursuant to 20 C.F.R. § 501.2(c), the Board can review only evidence that was before OWCP at the time of the final decision on appeal.

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 established a consequential lumbar condition as a result of her August 9, 2001 employment injury.

¹² The Board notes that Dr. Hanley was an associate of the physician selected as a second opinion physician. An associate may not perform a referee examination, because referees are selected on a strict rotational basis and the physician selected must perform the examination. *Sandra B. Williams*, 53 ECAB 334, 335 (2001). Second opinion physicians are selected based on a flexible method using a medical referral group that is not based on a strict rotation system. Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3 (July 2011).

¹³ Additional reports from a physician on one side of the conflict that is properly resolved by a referee physician are generally insufficient to overcome the weight accorded the referee's report or create a new conflict. *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2013 is affirmed.

Issued: March 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board