United States Department of Labor
Employees' Compensation Appeals Board

A.G., Appellant	)	
and	)	**Docket No. 09-2297**
	)	**Issued: August 24, 2010**
DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION DEPOT SAN JOAQUIN, Tracy, CA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 15, 2009 appellant filed a timely appeal from a June 29, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 16, 2003 on the grounds that she had no residuals of her accepted employment injuries; and (2) whether appellant established that she continued to be disabled from her accepted conditions after May 16, 2003 when her compensation benefits were terminated.

On appeal, appellant's attorney contends that the impartial medical evaluation was insufficient to carry the weight of the medical opinion.

FACTUAL HISTORY

On October 25, 2000 appellant, then a 44-year-old packer, twisted her back and fell while moving cartons with a hand truck. She stopped work that day and returned to limited duty on October 30, 2000.[1] The Office accepted that appellant sustained a lumbar strain right elbow strain, bilateral knee strain, bilateral osteochondral fracture of the lateral femoral condyle and chondromalacia. Appellant stopped work on October 26, 2001 and did not return. She underwent surgeries in November 2001 and March 2002, performed by Dr. Steven S. Isono, a Board-certified orthopedic surgeon, whose treatment reports advised that appellant was totally disabled due to severe degenerative joint disease of both knees and lumbar radiculopathy.[2]

On October 3, 2002 the Office referred appellant to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 22, 2002 report, Dr. Sherman reviewed the history of injury, the statement of accepted facts and appellant's medical treatment records. On examination, appellant complained of bilateral knee, right elbow and low back pain. Dr. Sherman diagnosed right elbow contusion, resolved, without neurologic or mechanical deficit; lumbosacral sprain, without neurologic or mechanical deficit and status post arthroscopic surgery of both knees with chondromalacia patella. He advised that any continuing disability was due to chondromalacia which was nonindustrial and preexisted the employment injury. Dr. Sherman noted that appellant had no need for further surgery and took over-the-counter medication for knee pain. He concluded that she could perform modified work under physical restrictions that he provided.

The Office found a conflict in medical opinion between Dr. Isono and Dr. Sherman regarding appellant's accepted conditions, residuals of her accepted injuries and her capacity for work. On February 6, 2003 it referred her to Dr. Clarence A. Boyd, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a March 14, 2003 report, Dr. Boyd reviewed the history of injury and medical treatment, including diagnostic testing. He noted appellant's complaint of back, elbow and knee pain. Dr. Boyd noted that several medical reports of record stated that appellant had given a history of the cart falling on her but she did not provide such history to him. On examination, appellant was 5 feet 6 inches tall and weighed 209 pounds. She walked without a limp but used a cane. There was tenderness over the midline of the lumbosacral spine with full active lumbosacral range of motion and complaints of pain. Neurologic examination of the lower extremities revealed intact pinprick sensation, and normal motor and reflex examinations. Straight leg raising was negative in the sitting position at 90 degrees bilaterally and was also negative in the supine position but limited at 75 degrees bilaterally by hamstring tightness. The sciatic stretch tests were negative bilaterally. Examination of the left knee revealed well-healed and nontender arthroscopic arthrotomy scars anteriorly with no evidence of joint effusion or increased skin warmth. The medial and lateral collateral ligaments were intact at full extension

[1] Appellant had a second claim accepted for left shoulder and neck sprains. On July 26, 1999 she was granted a schedule award for a 14 percent permanent impairment of the left arm.

[2] An August 21, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine showed a disc bulge at L4-5 with desiccation and Grade 1 anterolisthesis.

and at 30 degrees of flexion. Lachman's and McMurray's tests were negative. Palpation of the left knee revealed no patellar crepitus and complaints of tenderness over the lateral joint line and full range of motion. Examination of the right knee revealed no joint effusion and there was no evidence of increased skin warmth. Well-healed and nontender arthroscopic arthrotomy scars were noted anteriorly. There was slight patellar crepitus, and palpation revealed lateral joint line tenderness and evidence of a popliteal cyst. The medial and lateral collateral ligaments were intact at full extension and at 30 degrees of flexion, and the anterior and posterior cruciate ligaments were intact. McMurray's tests were negative and active range of motion was full at 0 to 120 degrees with no atrophy of either thigh.

Dr. Boyd diagnosed contusion and strain of the lumbar spine caused by the October 17, 2000 employment injury. He advised that, although the statement of accepted facts included diagnoses regarding both knees and right elbow, appellant did not give a history consistent with injury occurring at those joints and there was no mention of such injuries at the time of her initial medical treatment. As to her knees, Dr. Boyd stated that her description of injury was not consistent with an injury occurring to either knee or with any aggravation or acceleration of her preexisting degenerative disease of the knees, a condition that was not industrial. He stated that appellant could not climb but could sit, walk and stand, had received maximal treatment for the chondromalacia patella and degenerative joint disease, and no further therapy was indicated because she had full active range of motion of both knees with no evidence of contracture or muscle atrophy. Dr. Boyd disagreed with Dr. Isono's recommendation for possible total knee replacements because appellant did not have end-stage chronic or advanced degenerative joint disease of the knees. He recommended oral anti-inflammatory medication.

As to appellant's lumbar spine, Dr. Boyd advised that there were no objective factors of permanent impairment, noting that there were no bony or muscular abnormalities and full range of motion on physical examination. Neurologic evaluation of her lower extremities was normal with only subjective residuals. Dr. Boyd concluded that further treatment was not indicated for the lumbar spine injury and there was no medical indication for a discogram. Regarding appellant's right elbow, he advised that physical examination demonstrated no disability of any sort. Dr. Boyd concluded that, based on her lumbar strain and contusion, she could have performed modified duty within one week of the October 17, 2000 injury and could have resumed her regular, unrestricted duties eight weeks later. He advised that appellant could work eight hours a day and could perform her regular duties from the standpoint of her lumbar spine with no restrictions on sitting but because of her degenerative knee condition, she could not repetitively climb or use stairs and had a 35-pound lifting restriction.

By letter dated April 4, 2003, the Office proposed to terminate appellant's compensation benefits on the grounds that Dr. Boyd, who served as an impartial medical referee, found that her work injury had resolved.

On April 14, 2003 appellant retired on disability. On April 22, 2003 she stated that the hand truck and supplies fell on her at the time of injury and disagreed with Dr. Boyd's conclusion that her knee condition was not work related. Appellant argued that the bulging disc found on diagnostic testing was employment related. She submitted a statement from a coworker, who advised that she witnessed appellant fall on October 17, 2000 and the hand truck and supplies fell over her.

In an April 18, 2003 report, Dr. Isono stated his disagreement with Dr. Boyd regarding whether appellant's knee condition was employment related. He noted that the type pathology present was consistent with an acute injury as opposed to a degenerative-type process. Dr. Isono advised that appellant continued to have symptomatology regarding her knees, was restricted to semi-sedentary work due to her knee condition and could need knee replacement surgery in the future. On April 24, 2003 Dr. Park noted his disagreement with Dr. Boyd's opinion. He stated that appellant had significant disability relating to her low back that precluded her from returning to work that involved lifting, bending or repetitive activities that she could work a maximum of four hours a day, could not lift greater than 10 pounds and could sit only 40 minutes at a time.

In a May 16, 2003 decision, the Office terminated appellant's compensation as of May 18, 2003.[3] It found that the weight of medical opinion was represented by Dr. Boyd.[4]

On June 6, 2003 appellant requested a hearing. On April 29, 2003 Dr. Michael K. Park, a Board-certified physiatrist, advised that he discussed appellant's condition with her that day. On January 23, 2004 he stated his recommendation for a discogram. In reports from May 22, 2003 to January 23, 2004, Dr. Isono reiterated his findings and conclusions that appellant had persistent bilateral knee pain and effusion and persistent lumbar spine problems. He diagnosed bilateral degenerative joint disease of the knees and that she was totally disabled. Dr. Isono advised that appellant would need bilateral total knee replacement surgery.

At the March 4, 2004 hearing, appellant testified that on October 17, 2000 she fell onto a concrete floor when her foot was trapped under a hand truck, which fell across her body. She stated she had pain in her knees, elbow, hand and back and worked light duty for seven or eight months until her knee condition became so bad that she could not work. Appellant described her medical care and how the injury affected her activities of daily living. In an October 3, 2003 report, Dr. Donald K. Matthews, a Board-certified orthopedic surgeon, noted the history that appellant was injured at work when a hand truck with supplies fell on her and her current complaint of back and leg pain. Appellant had difficulty ambulating, utilized a cane and walked with an antalgic gait secondary to bilateral lower extremity weakness. Physical findings including tenderness to palpation at the L4-5 level with no spasm. Motor strength was weak on the right. Dr. Matthews diagnosed L4-5 spondylolisthesis with instability and chronic back pain, noting that it was difficult to assess a radicular component as she had bilateral knee problems, right greater than left.

In a May 13, 2004 decision, an Office hearing representative affirmed the May 16, 2003 decision, finding that the weight of medical opinion was presented by Dr. Boyd.

On August 5, 2004 appellant, through her attorney, requested reconsideration, contending that Dr. Boyd's report was not sufficient to carry the weight of the medical evidence, especially

[3] On April 30, 2003 appellant submitted a schedule award claim.

[4] The decision also purported to deny appellant's claim for a schedule award. It is error for the Office to combine the issue of impairment under a schedule award with the issue of disability in a termination decision. The Office may not summarily deny a claim for a schedule award on the basis that an employee has no residual disability for work. *See R.L.*, 61 ECAB ____ (Docket No. 09-1948, issued June 29, 2010).

since he did not consider appellant's knee condition to be employment related. An August 27, 2004 electrophysiologic study (EMG/NCS) of appellant's upper and lower extremities was interpreted as abnormal, demonstrating evidence of moderate carpal tunnel syndrome on the right, mild axonal sensorimotor peripheral neuropathy, and acute right L5 radiculopathy.

On November 4, 2004 the Office denied appellant's reconsideration request. Appellant appealed to the Board. In a June 9, 2005 order, the Board remanded the case to the Office for reconstruction of the case record.[5]

By letter dated September 28, 2006, appellant's attorney noted that he was forwarding an August 24, 2006 report from Dr. Mark J. Reiner, an osteopath.[6]

On March 24, 2008 the Office issued a merit decision, affirming the termination of appellant's compensation.

Appellant, through her attorney, filed an appeal with the Board. On February 20, 2009 appellant withdrew the appeal to request reconsideration before the Office. In an April 9, 2009 order, the Board dismissed the appeal.[7]

On reconsideration, appellant submitted a February 5, 2009 report from Dr. Reiner who reported that he first examined appellant on July 25, 2006. Dr. Reiner discussed treatment from the date he had last saw appellant on January 22, 2009. He noted her complaints of cervical, thoracic and lumbar spine pain, and pain in the arms, legs and knees and his review of some medical records, including Dr. Boyd's March 14, 2003 report. Regarding the lumbar spine, Dr. Reiner reported that lumbar MRI scans in June and October 2006 demonstrated a bulging disc at L4-5 and Grade 1 spondylolisthesis and an August 2006 lower extremity EMG/NCS demonstrated S1 radiculopathy bilaterally. Examination findings included restricted lumbar range of motion with spasm and tenderness present. Dr. Reiner reported that appellant had surgery for a right carpal tunnel decompression on September 12, 2007. Examination of the right elbow demonstrated tenderness, paresthesias along the ulnar distribution, and positive Tinel's and Phalen's signs and a December 2007 upper extremity EMG/NCS demonstrated progressive ulnar neuropathy at the elbow. Dr. Reiner diagnosed cervical strain and sprain, bulging lumbar disc at L4-5 with Grade 1 spondylolisthesis, lumbar radiculopathy, arthritis to the knees, status post carpal tunnel decompression of the right wrist, ulnar neuropathy of the right elbow and left wrist carpal tunnel syndrome. He advised that appellant was unable to work due to her chronic and permanent orthopedic problems and concluded that, based on his review of the records and his treatment, appellant sustained a permanent injury to the lumbosacral spine related to the work accident. Regarding the right elbow, Dr. Reiner stated that she contused it, but that there were no neurologic problems to the elbow or hands.[8]

[5] Docket No. 05-992 (issued June 9, 2005).

[6] Dr. Reiner's August 24, 2006 report is not found in the case record.

[7] Docket No. 08-1881 (issued April 9, 2009).

[8] The specific reports of the MRI scan and EMG/NCS studies are not contained in the case record.

In a June 29, 2009 decision, the Office denied modification of the prior decisions, finding that Dr. Reiner's report was insufficient to overcome the weight of the impartial referee physician, Dr. Boyd.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[9] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[10]

Section 8123(a) of the Federal Employees' Compensation Act[11] 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.[12] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[14]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a lumbar strain, right elbow strain, bilateral knee strains, fractures of the lateral femoral condyles and chondromalacia. Appellant underwent surgery in November 2001 and March 2002. Her attending physician, Dr. Isono, advised that she was totally disabled due to residuals of her accepted conditions. The Office referred appellant to Dr. Sherman, who noted that appellant's accepted conditions did not cause total disability. Rather, Dr. Sherman found that she could perform modified duty subject to physical

[9] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[10] *Id.*

[11] 5 U.S.C. §§ 8101-8193.

[12] *Id.* at § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

limitations. The Office found a conflict in medical opinion and referred appellant to Dr. Boyd, Board-certified in orthopedic surgery, for an impartial medical examination.[15]

The Board finds that Dr. Boyd's report is not sufficient to terminate appellant's compensation benefits. Where there exists a conflict in medical opinion and the case is 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, is entitled to special weight.[16] In this case, however, the Board finds that Dr. Boyd's opinion is of diminished probative value. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[17] The Office provided Dr. Boyd with a statement of accepted facts that indicated that it had accepted that appellant sustained bilateral knee strains, bilateral osteochondral fractures and bilateral chondromalacia.

Dr. Boyd noted in his report that the description of injury was not consistent with an injury occurring to either knee and was not consistent with aggravation or acceleration of her preexisting degenerative disease of the knees and that appellant's disability was nonindustrial. He noted diagnoses of chondromalacia patella and degenerative joint disease of the knees and provided physical findings regarding the knees. Dr. Boyd concluded that appellant's physical activity was limited due to the degenerative joint disease of the knees. Office procedures provide that, when a referee examiner does not use the statement of accepted facts as the framework in forming his or her report, the probative value of the opinion is seriously diminished or negated altogether.[18] Dr. Boyd did not recognize the accepted knee conditions and disputed that they were employment related. His opinion is outside the framework of the statement of accepted facts and of reduced probative value. It renders Dr. Boyd's report insufficient to meet the Office's burden of proof.[19] The termination decision will be reversed.[20]

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

[15] *Supra* note 9.

[16] *Glen E. Shriner*, 53 ECAB 165 (2001).

[17] *Helen Casillas*, 46 ECAB 1044 (1995).

[18] Federal (FECA) Procedure Manual, *supra* note 11.

[19] *Willa M. Frazier*, 55 ECAB 379 (2004).

[20] Based on this determination, the second issue is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2009 decision of the Office of Workers' Compensation Programs be reversed.

Issued: August 24, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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