United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 09-1613**
	)	**Issued: March 11, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 10, 2009 appellant timely appealed the March 9, 2009 merit decision of the Office of Workers' Compensation Programs, which declined her request for surgery. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for a total right knee arthroplasty.

FACTUAL HISTORY

Appellant, a 61-year-old customer service representative, sustained multiple injuries on April 21, 2005 when she twisted her ankle and fell on the sidewalk. The Office accepted her claim for cervical, thoracic and lumbar sprain/strain, bilateral shoulder sprain/strain, bilateral hand and wrist sprain, bilateral hip sprain/strain, right knee sprain, right ankle sprain and postconcussion syndrome. It also authorized two arthroscopic procedures for appellant's right

knee. The first procedure, an August 24, 2005 ablation chondroplasty of the medial femoral condyle and patella, was performed by Dr. Evelyn D. Witkin, a Board-certified orthopedic surgeon. On April 8, 2008 Dr. Witkin performed a diagnostic arthroscopy with irrigation lavage and injection of intra-articular steroids.

Shortly after the April 2008 arthroscopy, Dr. Witkin recommended a right total knee arthroplasty. The Office referred the surgery request to its district medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon. In a report dated May 24, 2008, Dr. Berman indicated that a right knee replacement would be appropriate under the circumstances; however, he believed the proposed surgery was unrelated to appellant's accepted knee sprain. He attributed the need for surgery to long-standing right knee osteoarthritis, which predated the April 21, 2005 employment injury.

Dr. Witkin wrote the Office again on June 16, 2008 advising of the need for a total joint replacement. She explained that appellant fell on a broken sidewalk on April 21, 2005, which caused an oblique tear of the right medial meniscus and a partial tear of the posterior cruciate ligament. Dr. Witkin also explained that, during follow-up surgery on April 8, 2008, there was further evidence of the same trauma with delaminating lesion of the medial femoral condyle. She stated that, because of the work-related problems, appellant developed progressive post-traumatic arthritis of the right knee, which required a total joint replacement. Dr. Witkin also indicated that, although appellant had not sustained further injury to her right knee, she had an ongoing problem of recurrent tearing of the meniscus and development of post-traumatic degenerative joint disease. She explained that there was no significant arthritis in appellant's opposite knee or elsewhere that would signify underlying problems or pathology. The Office subsequently referred appellant for another second opinion evaluation.[1]

In a report dated September 16, 2008, Dr. Zohar Stark, a Board-certified orthopedic surgeon and Office referral physician, diagnosed discogenic disc disease of the cervical spine and degenerative joint disease of the right knee. He indicated that neither diagnosis was related to the injuries appellant sustained on April 21, 2005. Dr. Stark further noted that the surgery performed in April 2008 was not related to the accepted diagnosis of right knee sprain. According to him, physical examination findings from January 8, 2007 indicated that appellant had recovered from her April 21, 2005 employment-related right knee injury. Dr. Stark further noted that, while right total knee replacement surgery was indicated, the recommended procedure was not a result of the injuries appellant sustained on April 21, 2005. He explained that appellant had degenerative joint disease of her right knee, which preceded the April 21, 2005 employment incident. Additionally, Dr. Stark noted there was no connection between the right knee degenerative joint disease and the incident in question. He stated that appellant had reached maximum medical improvement no later than January 10, 2007, and no further treatment was required for the work-related injuries sustained on April 21, 2005. Dr. Stark also indicated that appellant could resume her preinjury work without restriction.

[1] The Office had previously referred appellant to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, who examined her on January 10, 2007. At that time, Dr. Valentino found that appellant had recovered from her April 21, 2005 employment injury without residual. The Office later authorized additional arthroscopic surgery, which appellant underwent on April 8, 2008.

By decision dated March 9, 2009, the Office informed appellant that her request for surgery was denied. It explained that the proposed surgery was not related to appellant's work incident, but was instead necessitated by her preexisting osteoarthritis.

LEGAL PRECEDENT

An injured employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which the Office considers necessary to treat the work-related injury.[2] The Office has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on the Office's authority being that of reasonableness.[3] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.[4]

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of an employment-related injury or condition.[5] Proof of causal relationship must include rationalized medical evidence.[6] In addition to demonstrating causal relationship, the injured employee must also show that the requested services, appliances or supplies are medically warranted.[7]

ANALYSIS

On appeal, counsel argued that Dr. Stark's opinion should be disregarded because the August 22, 2008 statement of accepted facts he relied upon was defective. Counsel noted that the latest statement of accepted facts referenced Dr. Berman's May 24, 2008 opinion as well as an earlier second opinion evaluation from Dr. Valentino dated January 10, 2007. Appellant's counsel correctly cited the Federal (FECA) Procedure Manual in support of his argument that the statement of accepted facts should not have included the specific details of either physician's opinion. Counsel urges the Board to set aside the March 9, 2009 decision and refer appellant for another second opinion evaluation.

In the August 22, 2008 revised statement of accepted facts the Office indicated, *inter alia*, that Dr. Valentino found that appellant had fully recovered from her work-related injury and was capable of resuming full duty. The statement of accepted facts also noted that Dr. Valentino felt that no further treatment was necessary. As to Dr. Berman, the Office noted in the revised statement of accepted facts that its medical adviser believed that the April 8, 2008 arthroscopy

[2] 5 U.S.C. § 8103(a) (2006); 20 C.F.R. § 10.310(a) (2009).

[3] *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

[4] *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[5] *Debra S. King*, 44 ECAB 203, 209 (1992).

[6] *Joseph E. Hofmann*, *supra* note 3.

[7] *Id.* at 460-61.

and the recommended right total knee arthroplasty "were due to degenerative conditions rather than caused by the work injury."

Counsel is correct that the FECA procedure manual cautions against including certain "inappropriate" or "prejudicial" information in the statement of accepted facts, such as "medical opinions."[8] However, there is no prohibition against the Office providing the referral physician copies of relevant medical evidence. In fact, the FECA procedure manual indicates that the second opinion examiner should be provided copies of "all medical reports from the case record."[9] When the case was referred to Dr. Stark for a second opinion examination, the Office provided the doctor with copies of Dr. Berman's May 24, 2008 report as well as Dr. Valentino's January 10, 2007 report. Dr. Stark noted that he had in fact reviewed both reports. There is no clear indication from the record that Dr. Stark was unduly influenced by the Office's reference to the opinions of Dr. Valentino and Dr. Berman. Consequently, in light of the Board's ultimate determination in this case, Dr. Stark's September 16, 2008 report will not be excluded from the record.

The Board finds, however, that the case is not in posture for decision due to a conflict in medical opinions. Appellant's physician, Dr. Witkin, believed that a right total knee replacement was required. She also believed that the procedure was necessitated by appellant's April 21, 2005 employment injury. While Dr. Berman and Dr. Stark did not question the medical necessity of the requested procedure, they disagreed with Dr. Witkin's assessment that the surgery was necessitated by appellant's April 21, 2005 employment-related fall. Instead, they attributed the need for surgery to preexisting right knee arthritis.

Therefore, the case is not in posture for decision due to this unresolved conflict in medical opinion.[10] As noted, there is a conflict regarding whether appellant's April 21, 2005 employment injury either caused or contributed to her right knee arthritis. On the one hand, Dr. Witkin indicated that appellant suffered from post-traumatic arthritis. In contrast, Dr. Berman and Dr. Stark believed that appellant's right knee arthritis was a preexisting condition, and the April 21, 2005 employment injury neither hastened nor aggravated this

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.7 (September 2009). Although medical opinions should be excluded from the statement of accepted facts, the procedure manual explains that such opinions should not be confused with the medical history of the claim, which may properly be included. The procedure manual further notes that chronologies of care and nature of treatment received are facts surrounding the medical aspects of the claim, but are not themselves medical opinions. *Id.* at Chapter 2.809.7c.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9a (March 1995); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3c(2) (March 1994).

[10] The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

condition. Because of the unresolved conflict in medical opinion, the case will be remanded to the Office for referral to an impartial medical examiner.

CONCLUSION

The case is not in posture for decision. The Office should prepare a new statement of accepted facts to correct any deficiencies as previously discussed. After such further development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2009 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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