United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 11-1289**
	)	**Issued: January 24, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2011 appellant filed a timely appeal from the November 24, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation and medical benefits effective November 24, 2010.

FACTUAL HISTORY

On September 12, 2003 appellant, then a 35-year-old modified clerk, began experiencing pain and swelling in her left knee due to climbing stairs and walking on concrete floors at work.

[1] 5 U.S.C. § 8101 *et seq.*

She stopped work on September 24, 2003. On November 26, 2003 OWCP accepted the claim for left knee and ankle strain. On September 1, 2005 it expanded the claim to include traumatic arthritis of the left knee and paid appellant compensation for injury-related disability for work.[2]

On August 14, 2008 Dr. Robert Hurd, a Board-certified surgeon and treating physician, opined that appellant's work-related condition of her left knee and ankle sprains had resolved.

Appellant also received treatment from Dr. Clyde Henderson, a Board-certified orthopedic surgeon. In a January 2, 2009 report, Dr. Henderson advised that appellant's work-related condition continued. He explained that the sprain persisted and noted the lack of mobility of her knee and the increased knee pain that she sustained with prolonged flexion and sitting. In regard to the aggravation of appellant's knee arthritis, he opined that "clearly she continues to be bothered by ongoing symptoms related to the aggravation of the knee arthritis. This aggravation is a permanent problem for her. Even after appellant has a knee replacement she will continue to have less than a normal knee and will have a level of permanent impairment and disability as a result of the permanent nature of the aggravation of the left knee traumatic arthritis. I disagree that the aggravation has resolved."

OWCP referred appellant to Dr. Douglas Gula, a Board-certified orthopedic surgeon for a second opinion examination to determine whether she had any residuals of her left knee strain, left ankle strain and temporary aggravation of traumatic arthritis of the left knee.[3] In a report dated May 8, 2009, Dr. Gula noted her history of injury and treatment. He examined the left knee and ankle and determined that the left knee sprain and left ankle sprain resolved without residual. Dr. Gula noted that appellant had evidence of arthritis in the left knee which "preexisted the incident of this claim" and opined that the "aggravation of traumatic arthritis was temporary in nature and had returned to its baseline condition consistent with the known progressive nature of this preexisting condition." Furthermore, he attributed her current left knee arthritis and disability to her "chronic left knee injury sustained in the military." Dr. Gula opined that appellant could return to her date-of-injury position as a modified clerk and that she did not require any medical treatment for her work-related left knee sprain, left ankle sprain or aggravation of left ankle traumatic arthritis, which had resolved.

On June 8, 2009 Dr. Henderson indicated that, while appellant had some arthritic condition before her work injury, standing on floors at work made her condition worse. In a June 18, 2009 report, he noted that she had degenerative joint disease of the left knee and a preexisting arthritic condition.

[2] Appellant had a history of stress fractures in her lower extremities, due to running while in the military; left shoulder and cervical strains due to a work injury in March 1996; and a work-related left shoulder strain, which she sustained as the result of a work injury in 2000. Claims for other work injuries are not before the Board on the present appeal. Appellant underwent vocational rehabilitation in 2007 and obtained employment in a group home, in a primarily sedentary position, working with ex-offenders. OWCP informally offset her earnings from her wage-loss compensation beginning September 2, 2007.

[3] In a January 7, 2009 decision, OWCP terminated appellant's compensation benefits. In a decision dated March 3, 2009, it set aside the January 7, 2009 decision. OWCP found clarification was needed from its second opinion physician. However, when the second opinion clarification was not forthcoming, it determined that a new second opinion examination would be scheduled.

In a June 29, 2009 addendum, Dr. Gula explained that the left knee sprain and left ankle sprain were soft tissue injuries which were expected to resolve within 4 to 12 weeks. He noted that appellant had slight swelling of the left ankle, and explained that it was attributable to her body habitus or underlying degenerative condition and not a soft tissue injury, which occurred more than five years ago. Dr. Gula further noted that there were no objective clinical findings. He opined that he believed appellant's current condition and level of disability were attributable to her military injury. Dr. Gula explained that the accepted conditions were a "minor incident" and did not materially alter the pathology in her left knee, "particularly because there was no direct impact to the left knee or a twisting of the knee." He opined that the significance of this injury is minimal and "symptoms relevant to this type of flare-up would resolve relatively quickly" and would not be expected to persist for more than five years. Dr. Gula opined that the work-related left knee sprain, left ankle sprain and left knee traumatic arthritis resolved.

In a letter dated August 7, 2009, OWCP asked Dr. Henderson to comment on Dr. Gula's opinion. In a September 14, 2009 report, Dr. Henderson noted that appellant's left ankle revealed soft tissue swelling on the left side and the left knee had "crepitant range of motion" with subjective complaints of pain. He indicated that she denied a "specific injury" and believed that her injury was the result of standing on very hard floors over a period of 10 years. Dr. Henderson continued to treat appellant and submit reports noting her status and work restrictions. On December 14, 2009 OWCP was advised that Dr. Hurd was no longer appellant's treating physician.

On January 6, 2010 OWCP referred appellant to Dr. Martin McTighe, a Board-certified orthopedic surgeon, to resolve a conflict between Dr. Henderson and Dr. Gula regarding the nature and extent of any ongoing residuals of the work injury. In a February 8, 2010 report, Dr. McTighe found that appellant's accepted conditions had resolved and that her current disability was due to her military-related left knee injury. On February 18, 2010 OWCP requested that Dr. McTighe provide a supplemental report providing additional explanation in support of his conclusions. In an April 6, 2010 report, Dr. McTighe stated that findings on examination supported his conclusion and that any prolonged activity, whether or not employment related, could have aggravated appellant's degenerative condition. On May 27, 2010 OWCP again requested that Dr. McTighe provide additional reasoning for his opinion. Dr. McTighe refused to provide another report.

On August 2, 2010 OWCP referred appellant for a referee examination with Dr. Thomas Bender, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion.

In an August 30, 2010 report, Dr. Bender noted appellant's history of injury and treatment and examined her. He determined that she had antalgia on the left lower extremity and a "substantial amount of valgus of both legs," with the left more prominent. Dr. Bender noted that appellant was asked to perform a short squat in the stance phase and he found patellofemoral crepitance in both knees with no instability in either patellofemoral joint with the short squat. Bilateral ankle ranges of motion were equal. Ankle and calf circumferences were symmetrical while knee circumference was 42 centimeters on the right and 46 centimeters on the left with thigh circumference at 64 centimeters on the right and 62 centimeters on the left. Appellant had 9 degrees of valgus at the level of the right knee, as opposed to 15 degrees of valgus of the left knee, which was pathological. Dr. Bender further noted that she had normal mobility of her right

patellofemoral joint; no significant effusion of either knee; normal hip mobility and full range of motion of the right knee. The left knee was limited to 87 degrees of flexion. Dr. Bender opined that the left knee and ankle strains had resolved. He explained that the aggravation of left knee traumatic arthritis was temporary in nature and resolved. Dr. Bender noted that appellant appeared to be symptomatic as a result of her "service-connected conditions including intra-articular fractures and the subsequent progressive degenerative joint disease" which has developed in the military and made worse by her *pes planus* and obesity. He opined that the aggravation of traumatic arthritis of the left knee was considered temporary as there was no evidence of structural injury with permanency in terms of the aggravation of her traumatic arthritis of the left knee. Dr. Bender stated that the employment did not cause a permanent aggravation of left knee arthritis since there was no permanent structural changes in the left knee based on the results of an October 20, 2003 magnetic resonance imaging (MRI) scan. He stated that imaging studies did not show new, acute structural permanency that could be related to employment conditions from 1993 through 2003. Dr. Bender further noted that there were no objective changes concerning the aggravation of left knee traumatic arthritis which could be identified and attributed to her injury on September 12, 2003. He opined that the aggravation was temporary in nature resolving on or about July 25, 2005. Dr. Bender noted that there were no current objective findings of the work injuries. He opined that any continuing work restrictions were due to her service-connected conditions.

On October 15, 2010 OWCP proposed to terminate appellant's compensation benefits on the basis that the weight of the medical evidence, as represented by the report of Dr. Bender, established that the residuals of the work injury of September 12, 2003 had ceased.

In a letter dated October 25, 2010, appellant indicated that she was a disabled veteran who was hired by the employing establishment with full knowledge of her preexisting conditions. She indicated that her employment injuries continued.

By decision dated November 24, 2010, OWCP terminated appellant's compensation benefits effective November 24, 2010 on the grounds that she had no continuing residuals of her employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[5] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[6] To terminate authorization for medical treatment,

[4] *Curtis Hall*, 45 ECAB 316 (1994).

[5] *Jason* C. *Armstrong*, 40 ECAB 907 (1989).

[6] *Furman* G. *Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[7]

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[8] In cases where OWCP 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.[9]

ANALYSIS

OWCP determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the work injury of September 12, 2003 based on the opinions of Dr. Henderson, a Board-certified orthopedic surgeon and appellant's physician, and Dr. Gula, a Board-certified orthopedic surgeon and second opinion physician. Therefore, OWCP properly referred appellant to an impartial medical examiner, Dr. Bender, a Board-certified orthopedic surgeon.[10]

The Board finds that Dr. Bender's report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that residuals of appellant's employment injury have ceased. Dr. Bender provided a comprehensive review of appellant's medical history, reported his extensive examination findings and determined that there were no objective findings to support ongoing residuals of the accepted conditions. He noted that the accepted left knee and ankle strains had resolved and explained that there was no particular single direct trauma circumstance or event to the left leg that occurred at work while she did have trauma to both legs in 1988 while in the military. Dr. Bender explained that the left knee traumatic arthritis was temporary based on MRI scan results. He advised that imaging studies did not show new, acute structural permanency that could be related to work conditions from 1993 through 2003. Dr. Bender attributed the symptoms to her "service-connected conditions including intra-articular fractures and the subsequent progressive degenerative joint disease" which were made worse by *pes planus* and obesity. He opined that the aggravation was temporary in nature resolving on or about July 25, 2005. Dr. Bender noted that there were no current objective findings attributable to the accepted conditions and that appellant had no work restrictions due to the accepted conditions. He opined that any continuing work restrictions were

[7] *Calvin* S. *Mays*, 39 ECAB 993 (1988).

[8] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[10] As noted, OWCP initially referred appellant to Dr. McTighe who issued February 8 and April 6, 2010 reports. However, it deemed his reports insufficient and requested that he provide a clarifying opinion, which he refused to provide. As Dr. McTighe refused to provide a supplemental report that would resolve the medical conflict, OWCP properly referred appellant to Dr. Bender to resolve the conflict. *See Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

due to appellant's service-connected conditions. In these circumstances, OWCP properly accorded special weight to the impartial medical examiner's October 25, 2010 findings.

When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11] The Board finds that Dr. Bender's report is well reasoned and based on an accurate factual background such that it represents the weight of the medical evidence and establishes that disability and residuals attributable to the accepted conditions have resolved.

On appeal, appellant indicates that she disagrees with the OWCP findings because her condition has not changed in 17 years. She questioned the validity of the impartial medical examiner's opinion. As explained, Dr. Bender's report is entitled to special weight and it resolved the conflict in the medical evidence. Appellant did not provide any current medical evidence to explain why residuals of her accepted conditions had not resolved.

Appellant also requested a schedule award. The record does not indicate that OWCP has issued a final decision regarding a schedule award and therefore the Board does not have jurisdiction over the matter.[12]

Appellant may submit evidence or argument with a written request for reconsideration 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 OWCP met its burden of proof in terminating appellant's compensation benefits effective November 24, 2010.

[11] *See supra* note 9.

[12] *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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