United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 14-616**
	)	**Issued: July 8, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Versailles, KY, 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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2014 appellant, through her representative, filed a timely appeal from the October 21, 2013 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 to review the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation for the accepted meniscal tears; and (2) whether appellant met her burden to establish that the September 17, 2011 work injury aggravated her arthritis.

FACTUAL HISTORY

On September 17, 2011 appellant, a 52-year-old distribution/window clerk, sustained a traumatic injury in the performance of duty when she twisted her left knee while unloading a

[1] 5 U.S.C. § 8101 *et seq.*

large white cage from a truck. OWCP accepted her claim for tears of the medial and lateral meniscus. Appellant underwent arthroscopic medial and lateral meniscectomies and received compensation for temporary total disability on the periodic rolls.

Dr. Robert A. Smith, a Board-certified orthopedic surgeon and OWCP referral physician, evaluated appellant on May 24, 2012. He found that appellant currently suffered no residuals from the September 17, 2011 employment injury because her meniscal tears were removed successfully during arthroscopic surgery. Dr. Smith believed that her ongoing symptoms were related to preexisting and nonindustrial arthritis. He noted that operative findings showed incidental mild-to-moderate arthritic changes that were clearly preexisting and showed no structural aggravation. Although appellant's arthritis could certainly be treated, such treatment would be unrelated to the September 17, 2011 work injury.

Dr. Michael F. Cavanaugh, the attending Board-certified orthopedic surgeon, reviewed Dr. Smith's evaluation and concurred that appellant had healed from the accepted meniscal tears. He added, however, that the accepted conditions did not embody the entirety of the damage noted during appellant's arthroscopic evaluation. When Dr. Cavanaugh last saw appellant on March 22, 2012, her residual symptoms were primarily patellofemoral. Arthroscopically there was some damage to the retropatellar surface and he recommended viscosupplementation as a further treatment.[2] Dr. Cavanaugh had seen appellant since 2005 and she had experienced no left knee pain prior to the work injury. It was therefore his opinion that appellant's residual left knee pain arose from the September 17, 2011 work injury. Dr. Cavanaugh recommended that OWCP accept an aggravation or exacerbation of preexisting patellofemoral arthritis.

OWCP found a conflict in medical opinion between Dr. Smith and Dr. Cavanaugh on whether the September 17, 2011 work injury aggravated appellant's patellofemoral arthritis. It referred her, together with the medical record and a statement of accepted facts, to Dr. William D. Emper, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict.

Dr. Emper evaluated appellant on August 23, 2012. He took her history, noted her current symptoms and listed findings on physical examination. Dr. Emper reviewed all of her medical records, including a magnetic resonance imaging (MRI) scan study obtained on September 20, 2011. It showed degenerative arthritis of the patellofemoral joint. Dr. Emper found that appellant sustained tears of the medial and lateral menisci. Appellant had preexisting degenerative arthritis unrelated to the injury, which was established by diagnostic testing and arthroscopic findings. Dr. Emper found that the degenerative arthritis in appellant's left knee was not caused or aggravated by the accepted work incident. It was his opinion that she had no residuals from the September 17, 2011 work injury and that she had fully recovered with no disability or need for further medical treatment.

OWCP asked Dr. Emper to further explain his opinion that the work incident did not cause or exacerbate appellant's degenerative arthritis. Dr. Emper noted that x-rays on September 19, 2011, two days after the incident, showed medial joint space narrowing, which

[2] Arthroscopic evaluation of the patellofemoral articulation demonstrated "fissuring and fragmentation of the retropatellar surface not requiring debridement."

was a sign of degenerative arthritis. Further, follow-up x-rays, MRI scan and the operative report failed to document any evidence of exacerbation. A review of appellant's medical records revealed no objective evidence that appellant had an exacerbation of her degenerative arthritis and no objective evidence that she had any residual damage as a result of the work injury. Dr. Emper advised that his opinions were to a reasonable medical certainty.

In a decision dated March 25, 2013, OWCP terminated appellant's compensation for the accepted left meniscal tears.

Dr. Cavanaugh reviewed Dr. Emper's report and addressed his opinion that follow-up x-rays, the MRI scan and the operative report failed to document any findings of exacerbated degenerative arthritis. "I wish to ask Dr. Emper exactly what findings on arthroscopic evaluation are specific to an exacerbation or aggravation of underlying arthritis. In the 3,000 or so arthroscopic knee surgeries that I have personally performed in the past twenty or so years I am still unable to answer this question." It was Dr. Cavanaugh's understanding that appellant was not experiencing symptoms of arthritis prior to her work-related injury. He added that early after the work-related injury there were findings consistent with retropatellar pain. Arthroscopic evaluation documented with photographs a linear fracture of the retropatellar chondral surface, which is where appellant was currently experiencing her symptoms. Although x-rays after the work incident showed medial joint narrowing, appellant's symptoms were arising primarily from the patellofemoral articulation, which did not show evidence of arthritis on x-ray.

An MRI scan obtained on January 30, 2013 showed no significant change compared with the prior examination on September 20, 2011.

In a decision dated October 21, 2013, a hearing representative found that OWCP had met its burden of proof to terminate appellant's compensation for the accepted meniscus tears. The hearing representative found that the opinion of the impartial medical specialist represented the weight of the evidence and established injury-related residuals had resolved.

Appellant's representative argues on appeal that OWCP did not sustain its burden of proving that she no longer suffers from residuals of her left knee injury and surgery. He argued that OWCP did not properly select Dr. Emper to serve as the impartial medical specialist, as there was no screen shot of his selection. Appellant's representative also argued that Dr. Emper did not explain why he felt that appellant's degenerative arthritic condition was preexisting and he gave no medical reason for concluding that the work incident did not cause or aggravate her degenerative arthritis.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has

[3] 5 U.S.C. § 8102(a).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant tore her left medial and lateral meniscus when she twisted her knee at work on September 17, 2011. It paid her compensation benefits on the basis of the accepted meniscal tears. Dr. Smith, the orthopedic surgeon and OWCP referral physician, later examined appellant and found that she suffered no current residuals because the meniscal tears were removed successfully during arthroscopic surgery. Dr. Cavanaugh, the attending orthopedic surgeon who performed the surgery, agreed. He found that appellant had healed from the accepted meniscal tears.

There is no disagreement on this point. Dr. Emper, the orthopedic surgeon who served as an impartial medical specialist on another issue, also found that appellant had fully recovered from the meniscus tears with no disability or need for further medical treatment.

The clear weight of the medical opinion evidence of record establishes that appellant recovered from her meniscal tears. The Board finds that OWCP met its burden to justify the termination of compensation benefits for the accepted medical conditions. The Board will therefore affirm OWCP's October 21, 2013 decision on the issue of termination.

LEGAL PRECEDENT -- ISSUE 2

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,[6] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[7]

Causal relationship is a medical issue,[8] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,[9] must be one of reasonable medical certainty,[10] and must be supported by medical rationale explaining the

[5] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[6] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[7] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *Mary J. Briggs*, 37 ECAB 578 (1986).

[9] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[10] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

nature of the relationship between the diagnosed condition and the established incident or factor of employment.[11]

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 there exist opposing medical reports of virtually equal weight and rationale, 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, must be given special weight.[13]

ANALYSIS -- ISSUE 2

A conflict did arise between Dr. Smith and Dr. Cavanaugh on whether the September 17, 2011 work injury aggravated appellant's arthritis. Dr. Smith believed appellant's arthritis was nonindustrial, while Dr. Cavanaugh recommended that OWCP accept an aggravation or exacerbation of preexisting patellofemoral arthritis.

To resolve this conflict, OWCP referred appellant to Dr. Emper, a Board-certified orthopedic surgeon. It provided Dr. Emper with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper foundation.

Dr. Emper noted that an MRI scan obtained on September 20, 2011, only three days after appellant twisted her knee at work, showed degenerative arthritis of the patellofemoral joint. It was his opinion that appellant's arthritis was a preexisting condition and unrelated to the September 17, 2011 work injury. Dr. Emper explained that x-rays, MRI scan and the operative report failed to document any evidence of exacerbation.[14] His review of appellant's medical records revealed no objective evidence that the work incident had aggravated her arthritis. An MRI scan obtained on January 30, 2013 showed no significant change compared with the prior examination on September 20, 2011.

The Board finds that the opinion of the impartial medical specialist is based on a proper history and is sufficiently well rationalized that it must be accorded special weight in resolving the conflict on whether the September 17, 2011 work injury aggravated appellant's patellofemoral arthritis. As the weight of the medical evidence fails to establish the essential element of causal relationship, the Board finds that appellant has not met her burden of proof. The Board will affirm OWCP's October 21, 2013 decision on the issue of patellofemoral arthritis.

[11] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[12] 5 U.S.C. § 8123(a).

[13] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[14] Dr. Smith also noted that operative findings showed incidental mild-to-moderate arthritic changes that were clearly preexisting and showed no structural aggravation.

Appellant's representative contends on appeal that OWCP did not sustain its burden of proof that she no longer has residuals of her left knee injury and surgery. OWCP's burden extends only to the accepted meniscal tears and Dr. Cavanaugh agreed that appellant had healed from those tears. Accordingly, the accepted medical conditions no longer provided a basis for the payment of compensation. To the extent that appellant seeks workers' compensation benefits for a medical condition OWCP has not accepted, the burden of proof rests with her to establish her claim.

Appellant's representative argued there is no screen shot of Dr. Emper's selection. A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[15]

The Medical Management Application, which replaced the Physician Directory System, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examinations. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician.[16]

The claims examiner is not able to dictate which physician serves as the impartial medical specialist. A medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.[17]

If an appointment cannot be scheduled in a timely manner, or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the Medical Management Application will select the next physician in the rotation.[18]

[15] *Raymond J. Brown*, 52 ECAB 192 (2001).

[16] *See generally* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012).

[17] *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

[18] *Supra* note 16.

The record does show a screen shot of Dr. Emper's appointment information, together with an ME023 appointment notification report documenting his selection through the MMA, or Medical Management Application. The record supports his proper selection.

Appellant's representative also contends that Dr. Emper did not explain why he felt that appellant's degenerative arthritic condition was preexisting and he gave no medical reason for concluding that the work incident did not cause or aggravate her degenerative arthritis. Dr. Emper explained that x-rays taken on September 19, 2011 documented appellant's degenerative arthritis. Also, an MRI scan obtained on September 20, 2011 showed degenerative arthritis of the patellofemoral joint. It was his opinion that appellant's arthritis was preexisting, and Dr. Cavanaugh agreed. The attending orthopedic surgeon urged OWCP to accept an aggravation or exacerbation of preexisting patellofemoral arthritis.

Dr. Emper did offer rationale to support his opinion. He noted that follow-up x-rays, MRI scan and the operative report all failed to document any evidence of exacerbation. A review of appellant's medical records revealed no objective evidence that the work incident had aggravated her arthritis. Further, an MRI scan obtained on January 30, 2013 showed no significant change compared with the prior examination on September 20, 2011.

Dr. Cavanaugh's response to Dr. Emper is not sufficient to create a second conflict or require further development. As the operating surgeon, he conceded that he was unable to identify an arthroscopic finding that would be specific to aggravation. Dr. Cavanaugh's observation that appellant was asymptomatic before the work incident is insufficient, by itself, to establish the element of causal relationship.[19] He noted that x-rays taken after the work incident did not show evidence of arthritis, but the Board notes that they did show evidence of mild degenerative changes. As noted, an MRI scan obtained on January 30, 2013 showed no significant change compared with the prior examination on September 20, 2011, only three days after the work incident. If the work incident aggravated appellant's preexisting patellofemoral arthritis, there appears to be no objective evidence to document it.

Dr. Cavanaugh pointed to a linear fracture of the retropatellar chondral surface. His operative report notes that his evaluation of the patellofemoral articulation demonstrated "fissuring and fragmentation of the retropatellar surface not requiring debridement." If the September 17, 2011 twisting incident caused or aggravated this fissuring and fragmentation, Dr. Cavanaugh did not fully explain the element of causal relationship. His challenge to Dr. Emper to explain to a reasonable medical certainty how this condition could not be related to the work incident does not satisfy appellant's burden to establish causal relationship through positive, soundly reasoned medical opinion evidence. If appellant had early findings consistent with retropatellar pain, Dr. Cavanaugh must explain how the September 17, 2011 work injury caused these findings. Appellant carries the burden of proof.

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.

[19] *Thomas D. Petrylak*, 39 ECAB 276 (1987) (a temporal sequence of events is not sufficient to establish causal relationship).

CONCLUSION

The Board finds that OWCP met its burden to justify the termination of compensation for the accepted meniscal tears. The Board also finds that appellant has not met her burden to establish that the September 17, 2011 work injury aggravated her patellofemoral arthritis.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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