United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 14-1319**
	)	**Issued: February 3, 2015**
VETERANS HEALTH ADMINISTRATION, VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2014 appellant filed a timely appeal from the March 31, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP), which terminated her compensation benefits. 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 on appeal is whether OWCP properly terminated appellant's compensation and medical benefits effective April 6, 2014.

FACTUAL HISTORY

On May 27, 2011 appellant then a 53-year-old program assistant filed a traumatic injury claim alleging that, on May 23, 2011, she "slammed" into a cabinet and sustained an injury to

[1] 5 U.S.C. § 8101 *et seq.*

her right knee in the performance of duty. She stopped work on the date of injury. On August 29, 2011 OWCP accepted the claim for contusion of the right knee.[2]

On April 16, 2012 appellant requested that OWCP accept a left shoulder consequential injury. In an April 6, 2012 report, Dr. Randall N. Smith, a Board-certified orthopedic surgeon, and treating physician, noted that he saw her for the residuals of a May 23, 2011 work injury involving the right knee, which remained painful. He explained that appellant was using a cane to protect the knee and developed pain in the left shoulder. Furthermore, appellant was using the cane with the left arm and that was now a significant problem as well. Dr. Smith also reviewed her history and advised that she was still having problems with her left knee from another incident. He opined that, as a direct result of favoring the right knee and protecting the right knee with a cane, the left shoulder was deteriorating and he believed that there was "a direct relationship to the use of the cane putting the weight on the left shoulder and the rotator cuff tendinopathy which" was seen in a magnetic resonance imaging (MRI) scan of the left shoulder. Dr. Smith indicated that appellant was not working and recommended ergonomic evaluation of her work site to ensure that the employing establishment lessened the force on any of her injured areas. He stated that he was pessimistic about her prognosis.

On June 19, 2012 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Allan Smith, a Board-certified orthopedic surgeon, to determine if the accepted May 23, 2011 injury caused any additional injuries to the right knee or other part of the body and also to address whether she continued to have residuals of the accepted right knee contusion.

In a July 20, 2012 report, Dr. Robert Smith noted appellant's history of injury and treatment. He examined her on that date and determined that the right knee revealed no evidence of any soft tissue abnormality such as scarring or residual abrasions, and there was no swelling in the knee. Dr. Smith found that active range of motion of the knee was satisfactory with full extension to 100 degrees of flexion. The McMurray sign was negative and there was no finding of any internal derangement about the knee. Dr. Smith found no muscle atrophy and determined that motor strength was satisfactory. Additional findings included that the knee was stable with intact ligamentous structures and the patellofemoral joint was normal. Dr. Smith determined that the only accepted condition with regard to appellant's right knee related to the May 23, 2011 work incident was a contusion. He advised that her complaints about other parts of her body were unsubstantiated and unrelated to the work injury. Dr. Smith noted that appellant had no reason for altered gait and was not using any assistive device for ambulation. He opined that there was no evidence that she continued to suffer from residuals of her right knee contusion and there was no discernible ongoing injury. Dr. Smith also indicated that appellant did not require any additional treatment.

[2] The record reflects that appellant has filed other claims with OWCP. These include claim number xxxxxx904 accepted for a March 30, 2011 contusion of the left knee; claim number xxxxxx757 accepted for a July 26, 1993 lumbosacral sprain; claim number xxxxxx015 accepted for a June 26, 1997 left knee contusion; and claim number xxxxxx105 accepted for a July 14, 2002 closed dislocations of the fifth and sixth cervical vertebra, and closed dislocation of the thoracic vertebra. These other claims are not presently before the Board.

In an August 10, 2012 report, Dr. Randall Smith, the treating physician, noted that he had reviewed Dr. Robert Smith's report and did not agree with him. He opined that appellant could not return to work. Dr. Randall Smith explained that it started with the knee injury and favoring the knee, which caused her alignment to get out of position. Furthermore, appellant had chronic pain in the neck and back, which could occur with sitting or lying down for short periods of time, which prevented her from returning to her full-duty previous job. Dr. Smith indicated that she had not recovered from her May 23, 2011 condition. He indicated that appellant's objective findings included: popping in the knee, swelling of the knee, painful range of motion of the knee along with cervical/lumbar spasms, tenderness, postural scoliosis, and painful range of motion. Dr. Smith opined that he did not anticipate appellant's return to the workforce.

In a June 7, 2013 report, Dr. Randall Smith diagnosed: contusion, sprain, internal derangement, and chondromalacia. He advised that, due to her altered gait, appellant was developing pain throughout the right thigh, hip, and entire right leg making it difficult for her to stand, walk, and sit. Dr. Smith noted that an MRI scan of the right knee, revealed chondromalacia. He indicated that objective findings included swelling of the right knee. Dr. Smith explained that the injury caused a gait dysfunction leading to progressive deterioration of appellant's injury. Regarding work, he indicated that she could not stand, sit, or walk for any distance and opined that it was not reasonable for her to return to the workforce. Furthermore, appellant had reached maximum medical improvement with a guarded prognosis and would be unable to return to work without a surgery or a knee replacement. A June 3, 2013 right knee MRI scan, from Dr. Irene B. Darocha, a Board-certified diagnostic radiologist, showed chondromalacia of the patella.

On September 26, 2013 OWCP referred appellant along with a statement of accepted facts, and the medical record to Dr. Menachem Meller, a Board-certified orthopedic surgeon for an impartial medical evaluation to resolve the conflict in opinion between Dr. Randall Smith, the treating physician, who advised that her right knee condition remained symptomatic and would not improve without surgery, and the second opinion physician, Dr. Robert Smith, who opined that her right knee condition had resolved and that she could perform her usual job duties and did not require further treatment for her right knee.[3]

In an October 14, 2013 report, Dr. Meller noted appellant's history of injury and treatment and examined her on October 11, 2013. In reviewing the record, he noted June 19, 2011 and June 22, 2012 right knee MRI scan reports. Dr. Meller that signal changes of the medial femoral condyle noted on the June 19, 2011 report had resolved by the June 22, 2012 report. On examination, appellant had evidence of behavioral cofounders, with slow deliberate movements, flat guarded affect, and no visible impairment. Her gait was normal and she walked with one and one-half inch heels which she wore because she did not want to get her feet wet in the rain. Dr. Meller conducted range of motion testing and determined that appellant had limited movement. He presented findings which included approximately 60 degrees of flexion and -20 degrees of extension when sitting over the side of the table with the knee flexed 120 degrees with a soft endpoint. Appellant had normal stability, normal alignment, no crepitus on motion, no

[3] The record contains a September 26, 2013 ME023 appointment schedule notification, indicating Dr. Meller's selection and also indicating that no other physicians were bypassed.

meniscal signs, no popliteal fullness, no hamstring or gastrocnemius discomfort, no bruises, abrasions or ecchymosis, and no cutaneous lesions, including any sites of impact from the cabinet.

Dr. Meller advised that appellant had complaints of aches and pains in her neck, shoulders, upper back, lower back the right leg, and both knees. He advised that the MRI scan of the right knee one month following the injury demonstrated a bone bruise or contusion. Dr. Meller stated that a subsequent right knee MRI scan showed that the prior findings had healed or disappeared. He explained that appellant also had grade 3 patellofemoral retropatellar chondromalacia, which was another term for arthritis of the right kneecap. Dr. Meller opined that this was normal for her age and had no relationship to the original injury. He indicated that should appellant choose to have knee surgery it would not be related to her work activities or work injury of May 23, 2013. Dr. Meller opined that appellant "has no objective structural lesions relating to work preventing her from carrying out her work duties. [Appellant] does however have evidence of work intolerance and behavioral confounders unrelated to work injuries." He observed that, while out of work, she developed "diffuse left knee pain" that she attributed to favoring the right knee but he noted insufficient findings to explain the basis for the severity of left knee complaints. Instead, Dr. Meller opined that the right knee complaints were also due to aging wear and tear. He indicated that appellant was capable of returning to her preinjury occupation without any restrictions and no further treatment. In an accompanying October 16, 2013, work capacity evaluation, he advised that she could perform her usual job.

On February 26, 2014 OWCP proposed to terminate appellant's medical and wage-loss compensation based on the report of Dr. Meller. Appellant was given 30 days to submit additional evidence or argument.

In a March 13, 2014 letter, appellant noted that the physicians selected by OWCP were paid in excess of $800.00 for less than 15 minutes of work. She indicated that she had a basic understanding of FECA and noted that most of the people did not understand the concept of the "help." Furthermore, appellant indicated that she accepted "the proposed termination of medical/wage[-]loss compensation at this time for right now." She noted that she did not agree with the opinions of the second opinion and impartial medical examiners. In a letter dated March 14, 2014, appellant stated that she would appeal any decision to terminate her benefits. She noted that Dr. Meller was a colleague of her ex-fiancé, who worked as a psychotherapist. Appellant argued that Dr. Robert Smith was a second opinion physician for the left knee and OWCP misinformed Dr. Meller that Dr. Smith was a second opinion physician for the present claim. She asserted that she never saw Dr. Meller for her right knee. Appellant also indicated that his opinion was "preconceived." She stated that she found it strange that Dr. Meller photographed both knees, but did not mention them in his report. Appellant indicated that she would forward photographs of her knees.

In a July 22, 2013 report, Dr. Kai Syvertsen, a clinical psychologist, indicated that he saw appellant as part of a disability evaluation. Appellant related that she injured her knee at work and now had pain in both knees and that in 2012 she injured her shoulder using a cane because of the knee injuries. Dr. Syvertsen noted her treatment and examined her. He diagnosed major depressive disorder, recurrent severe without psychotic features, deferred, and knee, shoulder, and headache pain. Dr. Syvertsen indicated that appellant was unemployed and had no friends,

and financial difficulties. He indicated that her inability to complete activities of daily living was "partially due [to] physical limitations and partially due to lack of motivation and increased discomfort in social settings." In an August 9, 2013 report, Dr. Zhiping Mo, Board-certified in preventative medicine, indicated that appellant presented for a social security disability evaluation. He examined her and diagnosed chronic knee, leg, shoulder, and back pain. OWCP also received a July 19, 2013 intake assessment from Jenifer L. Erickson, a clinical counselor, who recommended psychotherapy and a neurological assessment.

In a letter dated March 26, 2014, appellant indicated that OWCP failed to provide her with a list of three physicians when the conflict appointment was arranged. She requested a list of three physicians from which she could select a "creditable" referee that conformed to the standards regarding a conflict adopted by OWCP. Appellant indicated that she had researched Dr. Meller's background and concluded that his report was not "creditable." She argued that his report was not impartial as he did not consider all of the orthopedic evidence. Appellant asserted that Dr. Meller did not consider that both her knees were swollen at the time of the examination, despite taking photographs. She noted that he refused to mention them in his biased report. Appellant also indicated that Dr. Meller has a personal vendetta against Dr. Randall Smith, her attending physician. She provided photographs of her knees.

In a March 31, 2014 decision, OWCP terminated appellant's compensation benefits effective April 6, 2014. It found that the weight of medical evidence rested with the impartial medical examiner, Dr. Meller.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden of proof 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]

Furthermore, 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.[6] 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.[7]

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

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

[6] 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[7] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

A claimant who asks to participate in the selection of a referee physician based on an objection to the physician selected, must provide reasons for the request to participate.[8] Examples of circumstances under which a claimant may participate in the selection of a referee are document bias or unprofessional conduct by the selected physician.[9]

ANALYSIS

OWCP accepted that appellant sustained a contusion of the right knee on May 23, 2011. On September 26, 2013 it determined that a conflict of medical opinion existed between Dr. Randall Smith, the treating physician, and the second opinion physician, Dr. Robert Smith.[10] Therefore, OWCP properly referred appellant to Dr. Meller, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In his October 14, 2013 report, Dr. Meller noted appellant's history, reviewed the medical record, and noted examining her. He found that she had normal knee stability and alignment with no crepitus on motion, no meniscal signs, and no popliteal fullness. Dr. Meller also found no bruises, abrasions, or ecchymosis, and no cutaneous lesions, including any sites of impact from the cabinet. He explained that a right knee MRI scan one month following the injury showed a bone bruise or contusion but that a subsequent MRI scan of the right knee demonstrated that the prior findings had healed or disappeared. Dr. Meller explained that appellant had patellofemoral retropatellar chondromalacia, which was another term for arthritis of the right kneecap. He advised that this was normal for her age. Dr. Meller advised that it had no relationship to the original injury. He stated that it was the type of arthritis which caused anterior knee pain with activities such as kneeling, squatting, or extensive stair climbing but was not the type of finding which prevented someone from performing clerical office work. Dr. Meller opined that she had no objective structural lesions relating to work preventing her from carrying out her work duties. He indicated that appellant was capable of returning to her preinjury occupation without any restrictions and needed no further treatment. Dr. Meller opined that any mood disorders or behavioral confounders were not work related.

The Board finds that Dr. Meller's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Meller examined her, reviewed his medical records, and reported an accurate history. He indicated that appellant's accepted right knee contusion had resolved and her present right knee condition was degenerative and not employment related. Because appellant no longer has residuals or disability related to her accepted employment condition, the Board finds that OWCP met its burden of proof to terminate compensation benefits.

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

[9] *Id*. *See L.J.*, Docket No. 13-1920 (issued February 18, 2014).

[10] Appellant alleged before OWCP that Dr. Robert Smith was not a second opinion physician for OWCP in the present claim for the right knee contusion. However, the record clearly reflects that OWCP referred her to him regarding the right knee condition and the affect of this condition on other parts of her body.

OWCP received a July 22, 2013 report from Dr. Syvertsen who conducted a disability examination and diagnosed major depressive disorder. Dr. Syvertsen indicated that appellant's inability to complete activities of daily living was "partially due physical limitations and partially due to lack of motivation and increased discomfort in social settings." On August 9, 2013 Dr. Mo diagnosed chronic knee, leg shoulder, and back pain. The Board notes that neither physician specifically addressed the May 23, 2011 right knee contusion or explained how any diagnosed condition was causally related to the May 23, 2011 right knee contusion. These reports are insufficient to overcome the weight accorded to Dr. Meller's report or to create a new conflict.[11] OWCP also received a report from a counselor. However, this report is of no probative value as she is not a physician under FECA and, therefore, not competent to provide a medical opinion.[12]

The Board notes that, subsequent to the examination and on appeal, appellant challenged the selection of the impartial medical examiner, Dr. Meller, and asked to be given a list of three physicians from which to select an impartial specialist. Furthermore, appellant argued that he had no credibility and was sued for malpractice.

To select a referee physician, OWCP used a medical management application with a strict rotational scheduling feature.[13] It documented the selection of Dr. Meller with an ME023 form, which also indicated that no physicians were bypassed. Appellant raised an objection to the selection when OWCP proposed to terminate her benefits and alleged that he was biased. As noted above, a claimant may participate in the selection if a valid reason is established. However, a general allegation that a physician is biased, without supporting documentation, is not sufficient.[14] Appellant did not provide any supporting documentation as to bias in this claim. There is no unqualified right to participate in the selection of an impartial specialist.[15] There is no evidence that Dr. Meller was improperly selected. The Board has held that an impartial medical specialist properly selected by OWCP will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise.[16] Here, there is no evidence of record supporting that Dr. Meller was unqualified to render an impartial opinion at the time he examined appellant or that his opinion was biased.

Appellant on appeal also repeated her arguments that the photographs were not mentioned in Dr. Meller's report. However, as explained, the Board has found that he conducted a complete examination and provided a well-rationalized opinion finding that appellant's

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

[12] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physicians assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

[13] *J.G.*, Docket No. 13-965 (issued December 11, 2013); *see supra* note 8 at Chapter 3.500.5 (March 2013).

[14] *S.C.*, Docket No. 12-801 (issued January 4, 2013).

[15] *A.H.*, Docket No. 11-2080 (issued July 26, 2012).

[16] 59 ECAB 471, 480 (2008).

employment-related condition had resolved. Appellant has provided no medical evidence addressing why mention of such photographs was medically necessary for a proper report. She also argued that she had not recovered from her work injury and continued to have residuals. Appellant indicated that OWCP was not clear in its termination decision and argued that the reasoning was not definitive enough. She also argued that her due process rights were violated. However, the record indicates that appellant was given a pretermination notice on February 26, 2014 and had an opportunity to submit evidence supporting her claim. OWCP's termination notice and its termination decision also made sufficient findings and offered a statement of reasons to provide appellant a reasonable explanation for the basis of OWCP's action. Appellant also asserted that her attempts to expand her claim were disregarded and asserted matters pertaining to her other claims. The Board notes however that it only has jurisdiction over the March 31, 2014 decision in the present claim.[17]

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 OWCP met its burden of proof in terminating appellant's benefits effective April 6, 2014.

[17] *See* 20 C.F.R. § 501.2(c). Appellant may wish to contact OWCP if she wishes to pursue matters in any of her other claims.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2014 decision of the Office Workers' Compensation Programs is affirmed.

Issued: February 3, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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