United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 17-0597**
	)	**Issued: September 1, 2017**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Albuquerque, NM, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant, through counsel, filed a timely appeal from a July 28, 2016 merit decision and an October 11, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established that her arthritis condition was a consequence of her accepted April 21, 2007 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 19, 2007 appellant, then a 45-year-old volunteer technical analyst, filed a traumatic injury claim (Form CA-1) alleging that on April 21, 2007 she contracted Lyme disease from a tick bite while hiking off trail in a forest. She did not immediately stop work. OWCP accepted the claim for Lyme disease on May 7, 2008.

In a letter dated October 15, 2010, appellant requested OWCP expand the acceptance of her claim to include inflammatory arthritis. She explained that her early Lyme disease symptoms had included joint inflammation. The inflammation had continued through three years of treatment and had caused severe joint cartilage erosion which rendered appellant crippled and disabled. Due to her arthritis and knee inflammation she was barely able to walk and had arthritic joint pain. Appellant also related that using her hands was painful and very difficult. Prior to contracting Lyme disease she did not have the arthritic pain she was experiencing.

In a November 17, 2010 report, Dr. Miguel Gonzalez, a treating Board-certified internist and pulmonologist, provided a history of injury and examination findings. He noted that review of x-rays taken during the time frame of March 25, 2009 to April 14, 2010 showed inflammatory arthritis of all joints with the most recent x-ray interpretation also showing erosive damage to multiple joints. Dr. Gonzalez attributed appellant's reactive rheumatic arthritis to her Lyme disease. He explained that appellant had pain and inflammation because of her Lyme disease treatment process. Dr. Gonzalez also opined that reactive rheumatic arthritis was a known complication of Lyme disease.

In a January 4, 2011 report, Dr. Mitchell Rosenfeld, an OWCP medical adviser, Board-certified in infectious disease and internal medicine, reviewed appellant's medical records and recommended that she be referred to a second opinion physician. He also recommended a complete Lyme (enzyme-linked immunosorbent assay) ELISA and repeat Western blot focusing on the IgG chronic phase reactant be conducted. Dr. Rosenfeld noted that appellant's tick bite history, subsequent arthralgias, and arthritis were consistent with Lyme arthritis and Lyme disease, although Lyme arthritis typically affected the knees. He further noted that Lyme disease was mostly a clinical diagnosis.

On May 12, 2011 OWCP referred appellant for a second opinion evaluation with Dr. Nilesh H. Hingarh, a physician Board-certified in infectious disease and internal medicine, to determine whether appellant's rheumatic arthritis was consequential to her accepted Lyme disease and whether Lyme disease had been confirmed by the tests OWCP's medical adviser recommended be conducted.

In a May 25, 2011 report, Dr. Hingarh, based upon a review of the medical opinion evidence, statement of accepted facts (SOAF) appellant's medical history, and physical examination, diagnosed inflammatory polyarthritis and obesity. He opined that there was no complete definitive evidence establishing that appellant's arthritis was caused by her Lyme disease. In support of this conclusion, Dr. Hingarh explained that the positive September IgM WB test might be a false positive and there were no additional rheumatologic studies available for review. He noted that there was evidence of physical limitation, but the permanency of her limitations depended on her response to physical therapy.

In a March 18, 2014 report, Dr. Gregory T. Heinen, an examining Board-certified orthopedic surgeon and orthopedic sports medicine physician, based upon a review of the medical record, injury history, and laboratory results, opined that appellant's Lyme disease caused her arthritis. In support of this conclusion, he noted appellant's positive IgM test, her likelihood of developing rheumatoid arthritis, and her history of Lyme disease and its involvement with joints and cardiac conditions. In addition, Dr. Heinen explained that the short time frame following the diagnosis of Lyme disease and the very aggressive degenerative changes were supportive of a causal relationship between her Lyme disease and arthritis.

On May 13, 2014 OWCP recommended referral to an impartial medical examiner as there was an unresolved conflict in the medical opinion evidence. The SOAF that OWCP provided noted the injury date, how the injury occurred, and that the claim had been accepted for Lyme disease. It also reported "[p]reexisting or concurrent medical conditions include: Reactive Rheumatic Arthritis (nonindustrial)."

On May 8, 2015 OWCP referred appellant to Dr. Ralph Bennett, a Board-certified internist and rheumatologist, to resolve the conflict in the medical opinion evidence between Dr. Hingarh and Dr. Heinen on whether her multiple joint conditions and degenerative arthritis were caused or aggravated by her accepted Lyme disease.

In a letter dated June 16, 2015, counsel requested that OWCP correct the SOAF which it had provided to Dr. Bennett. He noted the issue at hand was whether appellant's arthritis had been caused or aggravated by her accepted Lyme disease. Thus, it was inappropriate for OWCP to list nonindustrial reactive rheumatic arthritis as a preexisting or current medical condition. In addition, at the time of her injury, appellant had been working as a volunteer performing trail maintenance and was not a technical analyst as set forth in the SOAF.

In a November 17, 2015 report, Dr. Steven Harris, a treating Board-certified family practitioner, noted that appellant continued to have symptoms of her Lyme disease. He related that, while her Lyme western blot test was negative, it did show some reactivity and many patients at this stage of the disease did not produce antibodies. Dr. Harris explained that a western blot negative result did not rule out the diagnosis of Lyme disease especially when there was overwhelming clinical support.

Dr. Harris, in a November 30, 2015 addendum, diagnosed chronic Lyme disease along with symptoms. He observed that a September 11, 2007 Lyme western blot test was IgM positive, but that her current Lyme western blot test was negative with some reactivity. Dr. Harris explained that the diagnosis of Lyme disease was appropriate based on appellant's

overwhelming clinical presence. In addition, he noted that appellant had a history of muscle pain, history of joint stiffness and pain, depression, light sensitivity, cognitive slowing, migrating arthritis, fatigue, and hair loss.

A June 17, 2015 report by Dr. Bennett provided a history of injury, reviewed the medical evidence of record, and provided physical examination findings. He thereafter diagnosed rheumatoid arthritis and Lyme disease. Dr. Bennett opined that appellant's arthritis was unrelated to her accepted Lyme disease based on appellant's classic rheumatoid arthritis symptoms. He explained that arthritis associated with Lyme disease was oligoarticular or monoarticular arthritis, which was occasionally erosive. Dr. Bennett noted that appellant had a genetic predisposition to develop seropositive rheumatoid arthritis. In addition, he noted that the development of her condition following the tick point was not typical of Lyme arthritis as it involved multiple joints and there was no evidence of Lyme arthritis developing into seropositive arthritis. Dr. Bennett indicated that a Western blot test complying with Center for Disease Control/New York State (CDC/NYS) criteria was required to determine if appellant actually had Lyme disease. Next, he opined that if she did have Lyme disease then it would be more difficult to dismiss whether the Lyme disease aggravated her rheumatoid arthritis. Dr. Bennett concluded that appellant was totally disabled from work and required aggressive physical therapy to treat her rheumatoid arthritis. He indicated that, if she had Lyme disease, it could have aggravated her condition, which would have ceased when antibiotics were discontinued. While appellant had classic rheumatoid arthritis, Dr. Bennett opined that the joint issues appeared unrelated to Lyme disease.

By decision dated March 9, 2016, OWCP denied appellant's request to expand her claim to include a consequential arthritis condition.

In a March 11, 2016 letter, counsel contended that Dr. Bennett's opinion was not based on an accurate history as he questioned whether appellant had Lyme disease, which OWCP had accepted.

On April 4, 2016 appellant, through counsel, requested reconsideration and argued that the impartial medical examiner failed to base his opinion on the SOAF.

On July 19, 2016 OWCP received a supplemental report from Dr. Bennett. Dr. Bennett opined that appellant's rheumatoid arthritis was unrelated to her Lyme disease. In support of this conclusion, he observed that arthritis associated with Lyme disease usually involves several joints and has a late manifestation. Appellant had classic rheumatoid arthritis symptoms which developed shortly after the tick bite. Dr. Bennett also noted that appellant never had an accepted laboratory diagnosis of Lyme disease.

In a July 28, 2016 decision, OWCP denied modification of the March 9, 2016 decision. It found the evidence appellant submitted was insufficient to establish that her degenerative arthritis was a consequential injury of her accepted Lyme disease.

In a letter dated September 15, 2016, appellant requested reconsideration and submitted additional evidence.

In a September 12, 2016 report, Dr. Harris noted his disagreement with Dr. Bennett's opinion regarding appellant's rheumatoid arthritis and causal connection with her Lyme disease. He explained that the diagnosis of Lyme disease based on appellant's symptoms, signs, and history was consistent with the CDC definition of Lyme disease. Dr. Harris also referenced Dr. Heinen's opinion explaining the causal relationship between appellant's rheumatoid arthritis and her Lyme disease.

By decision dated October 11, 2016, OWCP denied reconsideration. It found appellant was not entitled to a merit review of the record as she failed to meet any of the requirements under 20 C.F.R. § 10.606(b).

LEGAL PRECEDENT -- ISSUE 1

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.[3] The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.[4] With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.[5]

Section 8123(a) of FECA 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.[6] The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7] In situations where 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.[8]

[3] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[4] *S.M.*, 58 ECAB 166 (2006); *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

[5] *L.S.*, Docket No. 08-1270 (issued July 2, 2009); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[6] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[7] 20 C.F.R. § 10.321; *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Elaine Sneed*, 56 ECAB 373 (2005).

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

OWCP's procedures provide as follows:

> "The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [district medical adviser], second opinion specialist, or referee physician renders a medical opinion based on an SOAF 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.[9]

ANALYSIS -- ISSUE 1

OWCP properly determined that a conflict existed in the medical opinion evidence regarding whether the claim should be expanded to include consequential degenerative arthritis conditions. Appellant's treating physicians, Dr. Gonzalez and Dr. Heine, both opined that appellant's Lyme disease was a cause of her arthritis. Dr. Hingarh opined that there was no definitive evidence supporting that appellant's arthritis was due to her Lyme disease. OWCP referred appellant to Dr. Bennett for an impartial medical examination to resolve this conflict.

The Board finds that Dr. Bennett's opinion was based on an inaccurate SOAF. To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information through the preparation of the SOAF.[10] OWCP's procedures require that the SOAF should not include factual issues that need to be determined.[11] The Board finds that the SOAF sent to Dr. Bennett provided that the condition of rheumatic arthritis was not work related and preexisting. The issue of whether the diagnosed rheumatic arthritis was a consequential injury of the accepted Lyme disease was the issue to be resolved by Dr. Bennett.[12] The SOAF is therefore improper as it prejudged the issue.[13]

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

[10] *N.G.*, Docket No. 15-0567 (issued April 27, 2015).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.7(e) (September 2009).

[12] *Id.* at Chapter 2.809 explains that "the SOAF is one of the most important documents a claims examiner (CE) prepares. It is the written summary of the CE's findings of facts. It serves as a factual frame of reference for the medical specialist, the CE or other case reviewer. When it is used by physicians who base their medical opinions solely on the information presented in the SOAF, the outcome of a claim may depend on its completeness and accuracy. Therefore, the SOAF must clearly and accurately address the relevant information.

a. *The SOAF represents* what OWCP in its capacity as fact finder has accepted as factual in a particular case. In *Leopold J. Gunston*, 15 ECAB 83 (1963), the Board stated:

"A statement of accepted facts is not a counterpart of a 'stipulation of facts' between adversarial parties in court procedure. In the determination of facts in a claim for compensation, [OWCP] is acting in its adjudicatory function as a trier of the facts." (Emphasis in the original.)

[13] *See C.F.*, Docket No. 10-1461 (issued March 18, 2011).

Dr. Bennett's report should not be accorded special weight because the SOAF which OWCP provided to him prejudged whether the rheumatic arthritis was a consequential injury.

Once OWCP undertakes development of the record, it has the responsibility to do so in a proper manner.[14] Given the error on the SOAF on which Dr. Bennett's report was based, it should not have afforded his opinion special weight on the issue of a consequential injury. Accordingly, the Board will remand the case to OWCP for further appropriate medical development. On remand, OWCP should prepare a proper statement of accepted facts and refer appellant to another impartial medical examiner to resolve the question of whether she has sustained rheumatoid arthritis as a consequence of her accepted April 21, 2007 employment-related Lyme disease. After such further development as deemed necessary, it shall issue a *de novo* decision on appellant's claim.[15]

CONCLUSION

The Board finds that this case is not in posture for a decision.

[14] *Melvin James*, 55 ECAB 406 (2004).

[15] In view of the Board's disposition of the first issue, the issue of whether OWCP properly denied appellant's request for reconsideration of the merits of her claim is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 11 and July 28, 2016 are set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: September 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board