United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 17-0851**
	)	**Issued: January 3, 2018**
SECURITIES & EXCHANGE COMMISSION, OFFICE OF HUMAN RESOURCES, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 7, 2017 appellant, through counsel, filed a timely appeal from a September 30, 2016 merit 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 over 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.*

ISSUE

The issue is whether appellant met her burden of proof to establish disability for intermittent periods commencing November 29, 2005 due to her accepted work injuries.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

Appellant, then a 60-year-old securities compliance examiner, has an accepted occupational disease claim (Form CA-2) for thoracic and lumbosacral neuritis/radiculitis, aggravation of degenerative thoracic and lumbar disc disease, and aggravation of thoracic and lumbar herniated disc(s), which arose on or about November 1, 2005.[4] She submitted claims for wage-loss compensation (Form CA-7) for intermittent periods of disability beginning November 29, 2005. Beginning in June 2009, OWCP issued several decisions denying appellant's claim for intermittent wage-loss compensation on or after November 29, 2005.

In an August 8, 2014 decision, the Board set aside a September 4, 2013 decision of OWCP as the impartial medical examiner (IME) had not adequately resolved the conflict in medical opinion evidence. The Board ordered OWCP to obtain a supplemental opinion from the IME.

In an August 24, 2015 decision, the Board set aside OWCP's October 23, 2014 decision denying compensation and remanded the case for further development of the medical evidence.[5] The Board found that a September 3, 2014 supplemental report from Dr. Ronald A. Ripps, a Board-certified orthopedic surgeon and IME, had not adequately addressed the Board's concerns raised in its August 8, 2014 decision.[6] The Board noted that, while OWCP provided Dr. Ripps a new statement of accepted facts (SOAF) which included all of appellant's accepted conditions, it remained unclear from his September 3, 2014 supplemental report whether he acknowledged that appellant had sustained all of the accepted thoracic and lumbar conditions. Consequently, the Board directed OWCP to refer appellant to another IME for purpose of resolving the conflict in medical opinion regarding whether appellant's claimed disability on or after November 29, 2005 was employment related.

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[3] Docket No. 15-1086 (issued August 24, 2015); Docket No. 14-0791 (issued August 8, 2014); Docket No. 12-1386 (issued May 2, 2013); Docket No. 11-0225 (issued September 8, 2011).

[4] Appellant attributed her middle and lower back condition to lifting heavy boxes of documents on many occasions. She filed claims for wage loss for intermittent periods beginning November 29, 2005.

[5] Docket No. 15-1086 (issued August 24, 2015).

[6] Docket No. 14-0791 (issued August 8, 2014). In a September 8, 2011 decision, the Board had remanded the case to OWCP, finding that an August 14, 2008 report of Dr. William Healy, a Board-certified orthopedic surgeon who previously served as an IME, required clarification regarding appellant's work-related disability on or after November 29, 2005. Docket No. 11-0225 (issued September 8, 2011). In a May 2, 2013 decision, the Board found that Dr. Healy's November 28, 2011 supplemental report did not adequately clarify his earlier report and it remanded the case to OWCP in order to refer appellant to a new IME. Docket No. 12-1386 (issued May 2, 2013).

On remand OWCP referred appellant to Dr. James M. Kipnis, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It provided Dr. Kipnis with a March 30, 2016 SOAF, which identified appellant's accepted conditions as thoracic and lumbosacral neuritis/radiculitis, aggravation of degenerative disc disease (thoracic and lumbar), and aggravation of herniated disc (thoracic and lumbar).

In an August 9, 2016 report, Dr. Kipnis discussed appellant's factual and medical history, including OWCP's recitation of her accepted conditions. He reported the findings of his physical examination on that date, noting that appellant did not exhibit objective evidence of neurologic deficits, radicular symptoms, atrophy, or palpable spasms. Appellant's motor strength in her lower extremities was 5/5 and her reflexes were 2+ equal and symmetric. Dr. Kipnis noted that x-rays of appellant's thoracic and lumbar spine obtained in his office demonstrated maintenance of disc space height and alignment throughout her thoracic and lumbar spines. He indicated that appellant did not present with any clinical signs or symptoms of neuritis/radiculitis. Dr. Kipnis noted that a February 2, 2006 magnetic resonance imaging (MRI) scan of the lumbosacral spine demonstrated disc bulges with no evidence of neuroforaminal compromise and that December 19, 2005 lumbosacral x-rays showed a question of a slight scoliosis versus positioning, with normal disc spaces, good alignment, and no evidence of degenerative osteophyte formation.

A February 2, 2006 MRI scan of the thoracic spine showed right-sided small extruded T6-7 disc herniation, small central T7-8 disc herniation, and left-sided T8-9 disc herniation. Dr. Kipnis noted that August 14, 2008 MRI and computerized tomography (CT) scans of the thoracic spine showed multilevel pathology, without segmental or neuroforaminal stenosis at any level. He indicated that, based upon these results, he was unable to provide a well-reasoned medical explanation, with supporting objective findings, as to how the work injury of November 1, 2005 either directly caused, aggravated, precipitated, or accelerated the accepted diagnosis of thoracic and lumbosacral neuritis/radiculitis. Dr. Kipnis further noted that it was medically probable that, for a disc herniation to be an acute event caused by lifting, the patient would present with a specific occurrence. However, it was more medically probable that appellant's disc herniations "described and discovered incidentally on an MRI" scan were degenerative in nature rather than occurring as acute incidents at work.

Dr. Kipnis further noted that he was also unable to provide a well-reasoned medical explanation, within a degree of medical certainty, as to how the work-related injury of November 1, 2005 directly aggravated a lumbar herniated disc. He advised that the MRI scans of the lumbosacral spine only demonstrated disc bulges, with no report of a herniation. Dr. Kipnis noted that appellant's repetitive lifting of boxes did not cause any material change in her condition as evidenced by a lack of any neurologic findings reported on any physical examination, and no evidence of disc progression on any subsequent MRI scan. He advised that a temporary aggravation caused disability from November 1, 2005 through April 26, 2006, and indicated that this disability was caused by nonwork-related factors, including healing rib fractures, chronic narcotic use, lack of physical therapy, depression, fibromyalgia, and knee and

ankle injuries, as well as by a new herniated lumbar disc from May 16, 2006.[7] Dr. Kipnis indicated that appellant did not suffer from disabling residuals of the accepted conditions, noting that there had never been, nor was there currently, any clinical evidence of a thoracic or lumbosacral neuritis/radiculitis. He indicated, "There has not been, nor is there currently, an aggravation of a herniated disc and the aggravation of degenerative disc disease of thoracic and lumbar spine are temporary in nature as evidenced by the fact that she has no progression of any disc-related pathology on any MRI [scan]."

In a September 30, 2016 decision, OWCP found that appellant failed to establish disability for intermittent periods commencing November 29, 2005 due to her accepted employment injuries. It determined that the weight of the medical evidence regarding this matter rested with the August 9, 2016 report of Dr. Kipnis, the IME.

LEGAL PRECEDENT

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[8] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[9] Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[10]

The IME's report must actually fulfill the purpose for which it was intended. It must resolve the conflict in medical opinion.[11] OWCP should ensure that the IME's report is comprehensive, clear, and definite, and that it is based on current information and supported by substantial medical reasoning, as well as a review of the case file.[12] If the report is vague, speculative, incomplete, or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct any defects.[13]

ANALYSIS

In December 2007, OWCP accepted appellant's occupational disease claim for thoracic and lumbosacral neuritis/radiculitis, which arose on or about November 1, 2005. It later

[7] Dr. Kipnis noted that appellant reported that she suffered a back injury by lifting a box of documents at work on May 16, 2006, but the record does not indicate that OWCP has accepted a May 16, 2006 traumatic back injury.

[8] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The district medical adviser (DMA), acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

[9] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

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

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims**,** *Developing and Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).

[12] *Id.*

[13] *Id.*

expanded the accepted conditions to include aggravation of degenerative thoracic and lumbar disc disease, and aggravation of thoracic and lumbar herniated disc(s) as accepted conditions. Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005.

OWCP engaged in extensive development of the medical evidence in order to determine whether appellant established employment-related disability for intermittent periods commencing November 29, 2005. As part of this development, it referred her to Dr. Ripps for an impartial medical examination and Dr. Ripps produced a July 10, 2013 report. In an August 8, 2014 decision, the Board remanded the case to OWCP for further development of the medical evidence noting that Dr. Ripps' July 10, 2013 report was not sufficiently rationalized to constitute the weight of the medical evidence regarding appellant's disability claim.

In an August 24, 2015 decision, the Board again remanded the case for further development of the medical evidence, noting that Dr. Ripps' September 3, 2014 supplemental report was not sufficiently rationalized to constitute the weight of the medical evidence. The Board directed OWCP to refer appellant to another IME for the purpose of obtaining his or her rationalized medical opinion regarding whether appellant had employment-related disability on or after November 29, 2005.

On remand OWCP referred appellant to Dr. Kipnis for an impartial medical examination and opinion regarding whether appellant was totally disabled on or after November 29, 2005 due to the accepted employment injury. Dr. Kipnis produced an August 9, 2016 report. OWCP then issued a September 30, 2016 decision denying appellant's claim for employment-related disability commencing November 29, 2005, finding that Dr. Kipnis' August 9, 2016 report constituted the weight of the medical evidence.

The Board finds that Dr. Kipnis' opinion is not sufficiently well rationalized to constitute the weight of the medical opinion evidence regarding whether appellant had disability for intermittent periods commencing November 29, 2005 due to her accepted work injuries.[14] As noted, OWCP accepted appellant's claim for lumbosacral and thoracic neuritis or radiculitis, aggravation of degenerative thoracic and lumbar disc disease, and aggravation of thoracic and lumbar herniated disc(s). It instructed Dr. Kipnis to determine whether appellant had disability on or after November 29, 2005 due to her accepted work injuries listed in the SOAF. Contrary to the SOAF, Dr. Kipnis opined in his August 9, 2016 report that he did not believe that several of appellant's accepted thoracic and lumbar conditions were employment related. He indicated that, based upon the results of diagnostic testing, he was unable to provide a well-reasoned medical explanation, with supporting objective findings, as to how the work injury of November 1, 2005 either directly caused, aggravated, precipitated, or accelerated the accepted diagnosis of thoracic and lumbosacral neuritis/radiculitis. Dr. Kipnis also advised that he was unable to provide a well-reasoned medical explanation, within a degree of medical certainty, as to how the work injury of November 1, 2005 directly aggravated a lumbar herniated disc.[15]

[14] *Gary R. Sieber*, *supra* note 10.

[15] Dr. Kipnis noted that appellant's repetitive lifting of boxes did not cause any material change in her condition as evidenced by a lack of any neurologic findings reported on any physical examination, and no evidence of disc progression on any subsequent MRI scan.

In *L.A.*,[16] the Board reversed OWCP's termination of the claimant's wage-loss compensation and medical benefits because the IME noted that the claimant merely sustained a lumbar sprain and failed to acknowledge the accepted conditions of lumbosacral neuritis or radiculitis. OWCP had terminated benefits based on the IME's opinion that the lumbar sprain had resolved. In *N.C.*,[17] the Board reversed OWCP's termination of the claimant's wage-loss compensation and medical benefits because OWCP had relied on the opinion of the IME who determined that the claimant merely sustained soft tissue injuries as a result of two employment incidents, instead of the accepted conditions of lumbosacral radiculitis of the lower extremities, lumbar acquired spondylolisthesis, and L5 spondylosis. The Board has held that it is well established that medical reports must be based on a complete and accurate factual and medical background; medical opinions based on an incomplete or inaccurate history are of diminished probative value.[18]

In the present case, OWCP erred in relying on a report from a physician who disregarded several accepted conditions listed in the SOAF when providing an opinion regarding whether appellant's accepted conditions caused disability for intermittent periods on or after November 29, 2005.[19] Because Dr. Kipnis' August 9, 2016 report was not based on an accurate history, his opinion was not well rationalized and should not be given the special weight of evidence.[20]

For the above-noted reasons, Dr. Kipnis' opinion requires clarification and elaboration. Therefore, in order to resolve the conflict in the medical evidence, the case will be remanded to OWCP for referral of the case record, a current detailed SOAF and, if necessary, appellant, to Dr. Kipnis for a supplemental report regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.[21] OWCP should clearly advise Dr. Kipnis of all of appellant's accepted conditions and provide him with a detailed description of the accepted work factors that caused appellant's accepted thoracic and lumbar conditions. If the IME is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must refer appellant, along with the case record and a detailed SOAF, to another IME for the purpose of obtaining a rationalized medical

[16] Docket No. 14-1138 (issued September 9, 2014).

[17] Docket No. 15-1855 (issued June 3, 2016).

[18] *See L.A.*, *supra* note 16, and *N.C.*, *supra* note 17.

[19] *Id.*

[20] *Id.* Moreover, the Board notes that Dr. Kipnis' August 9, 2016 report is of limited probative value on the relevant issue of this case for the further reason that he provided an inaccurate history when he discussed a November 1, 2005 traumatic injury despite the fact that no such traumatic injury has been accepted by OWCP. *See supra* note 18. Dr. Kipnis also indicated that appellant suffered a "temporary aggravation" causing disability from November 1, 2005 through April 26, 2006, but he provided an equivocal opinion regarding the nature and cause of such an aggravation. The Board has held that an opinion which is equivocal in nature is of limited probative value regarding the issue of causal relationship. *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

[21] *See supra* note 11.

opinion on the issue.[22] After completing such further development, OWCP shall issue a *de novo* decision regarding appellant's disability claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.[23]

Issued: January 3, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

[22] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[23] Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.