

**United States Department of Labor
Employees' Compensation Appeals Board**

V.G., Appellant)	
)	
and)	Docket No. 17-0583
)	Issued: July 23, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
New York, NY, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant, through counsel, filed a timely appeal from a September 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has met her burden of proof to establish continuing employment-related disability or residuals effective January 3, 2013 causally related to the accepted February 28, 2011 employment injury.

FACTUAL HISTORY

This case was previously before the Board.³ On March 1, 2011 appellant, then a 45-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury at work on February 28, 2011 after her chair tilted forward and she fell to the floor. OWCP accepted the claim for neck and lumbar sprains. Appellant received wage-loss compensation and medical treatment.

By decision dated June 5, 2015, the Board affirmed an August 2, 2013 termination decision of OWCP. The Board found that OWCP had met its burden of proof to terminate appellant's compensation benefits based on an October 17, 2012 report of Dr. Alan Crystal, a Board-certified orthopedic surgeon and impartial medical examiner, who reviewed the medical evidence of record and conducted a physical examination to resolve a conflict in the medical opinion evidence.⁴ Dr. Crystal found that appellant was not disabled due to her February 28, 2011 employment injury, but from the additive effects of her degenerative conditions of arthritis of the hips, knees, shoulders, and spine, which were not related to the employment injury. He explained that disc pathologies in the form of bulging or herniation would not occur from a fall from a chair at a low height level. Dr. Crystal found no objective findings consistent with symptomatic herniated discs impinging on nerve roots or sprains of the cervical and lumbar spine. He concluded that "[a]nalysis of the objective medical evidence clearly and overwhelmingly concludes that [appellant] did not sustain a left hip fracture," finding that she had arthritis and osteophytes of the left hip that could be confused on x-ray with a fracture. Dr. Crystal explained that, if a fracture of the left hip had occurred on February 28, 2011, the magnetic resonance imaging (MRI) reports and bone scans would have shown residual evidence of a previous fracture. He further indicated that appellant had preexisting degenerative disease of her shoulders, which was confirmed by x-ray. Dr. Crystal explained that appellant, while picking herself off the floor, did not experience any additional forces on the shoulders than what she would experience during activities of daily living, thus, concluding that her bilateral shoulder condition was not causally related to the employment injury. He determined that appellant had reached maximum medical improvement (MMI) and was capable of working as a full-time, sedentary registered nurse with the following restrictions: no lifting over 10 pounds; limited walking and stair climbing.

The facts of the case, as set forth in the prior Board decision, are incorporated herein by reference.

³ Docket No. 14-0632 (issued June 5, 2015).

⁴ OWCP found that a conflict in medical opinion arose appellant between a second opinion physician, Dr. Marvin Gilbert, a Board-certified orthopedic surgeon, and appellant's attending physicians, Dr. Daniel Markowicz, a Board-certified orthopedic surgeon, and Dr. Suhir Diwan, a Board-certified anesthesiologist, on the issue of whether appellant had continuing disability or residuals due to the accepted employment-related conditions.

Following the issuance of the Board's June 5, 2015 decision, on May 31, 2016, counsel requested reconsideration and submitted a March 23, 2016 report from Dr. John P. Reilly, a Board-certified orthopedic surgeon, who diagnosed right hip arthritis and disc bulging radiculopathy. Dr. Reilly noted that appellant was seen for a right hip and low back evaluation with pain radiating into the right hamstring area. He reported that the pain had been ongoing for about a week and there was "[n]o specific injury." In a March 31, 2016 progress report, Dr. Reilly found that an x-ray of appellant's hip was unremarkable and noted that a December MRI scan showed moderate-to-marked discogenic disease. He opined that appellant's symptoms were radicular and recommended consultation with pain management and physical therapy. Appellant also submitted an electromyography (EMG) dated April 12, 2016 which revealed evidence of chronic bilateral L5-S1 lumbosacral radiculopathy and polyneuropathy.

Appellant submitted nerve conduction studies dated April 12, 2016 and a lumbar spine MRI scan dated December 4, 2015 which demonstrated mild central disc protrusion at T12-L1, mild disc bulging at L4-5, and bilateral facet hypertrophy at L4-5 and L5-S1.

In a June 6, 2016 report, Dr. Reilly noted that appellant was injured when she fell off her chair at work on February 28, 2011 and over the course of several years she had struggled greatly with multiple complaints, including her neck, back, left hip, and right knee. He reviewed appellant's medical history and opined that falling onto her buttocks, particularly since the impact was asymmetric to the left side, was consistent with a valgus impacted hip fracture. Dr. Reilly disagreed with Dr. Crystal's opinion regarding appellant's x-rays and opined that there was subtle valgus alignment, whereas Dr. Crystal's assessment and conclusion was drawn from the MRI scan and bone scans. He opined that the x-rays noted a valgus impacted fracture and with the clinical course for the injury at five-and-a-half months, there was no reason to conclude that there would still be evidence of the fracture on the MRI scan, as well as the bone scan at 11 months from the fracture. Dr. Reilly further noted that Dr. Crystal's opinion with regard to appellant's left hip was in contradiction to four Board-certified orthopedic surgeons' assessments and conclusions. He concluded that appellant's medical history and radiographic studies supported his opinion that she sustained a left hip fracture and required a right knee replacement as a result of her employment injury. Dr. Reilly determined that appellant had not yet reached MMI and opined that she was totally disabled for work.

In progress reports dated May 2, July 23, and September 19, 2013, May 3, August 4, and November 11, 2014, and May 12, 2016, Dr. Reilly continued to diagnose right hip arthritis with lumbar arthritis and disc bulging radiculopathy and found that x-rays showed some arthritic change. On March 25, 2014 he diagnosed right foot *pes planus*, left hip arthritis, and history of right knee replacement with pain.

On December 5, 2012 a physician assistant diagnosed coccydynia and right knee pain.

Appellant submitted reports dated September 21, 2012 and February 5, 2013 from Dr. Markowicz, who noted that she had a unique history of having staged bilateral total knee replacements. Dr. Markowicz indicated that appellant fell at work on February 28, 2011 and was eventually "diagnosed with a femoral neck fracture, but it was well after the injury." He found that there was a significant delay in diagnosis, but thankfully appellant's fracture was nondisplaced and did heal. Dr. Markowicz opined that there was a definite causal relationship between appellant's injury and the fall at work resulting in her femoral neck fracture. He reported that the

only trauma that appellant suffered was the fall at work on February 28, 2011 until she was diagnosed with femoral neck fracture. Appellant also resubmitted reports from Dr. Markowicz dated July 3 and October 2, 2012.

A right ankle MRI scan dated July 20, 2014 showed no evidence for a tendon or ligament tear and the left hip MRI scan showed no evidence for osteonecrosis and no significant degenerative change in the hip.

By decision dated September 7, 2016, OWCP denied modification of its prior decision finding that Dr. Crystal continued to carry the special weight of the medical evidence.

LEGAL PRECEDENT

Once OWCP properly terminates a claimant's compensation benefits, he or she has the burden of proof to establish continuing disability after that date related to the accepted injury.⁵ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁶ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁷

ANALYSIS

On prior appeal, the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits based on the October 17, 2012 report of impartial medical examiner Dr. Crystal who reviewed appellant's medical history, examined her, and found no objective evidence of ongoing residuals or disability due to her cervical and lumbar sprains. Dr. Crystal concluded that appellant was not disabled due to her February 28, 2011 employment injury, but from the additive effects of her degenerative conditions of arthritis of the hips, knees, shoulders and spine, which were not related to the employment injury.

As the Board had previously affirmed the termination of appellant's wage-loss compensation and medical benefits on June 5, 2015, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.⁸ The only issue before the Board is whether appellant has established continuing employment-related disability or residuals on and after January 3, 2013, causally related to the February 28, 2011 employment injury. The Board finds that appellant has failed to meet her burden of proof to establish continuing employment-related disability or residuals.

In support of her claim, appellant submitted further reports from Dr. Reilly who diagnosed bilateral hip arthritis, lumbar arthritis, disc bulging radiculopathy, right foot *pes planus*, and history

⁵ *O.W.*, Docket No. 17-1881 (issued May 1, 2018); *Manual Gill*, 52 ECAB 282 (2001).

⁶ *Id.*

⁷ *S.F.*, Docket No. 17-1427 (issued May 16, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁸ *See D.M.*, Docket No. 18-0067 (issued May 9, 2018) n.14; *P.B.*, Docket No. 17-1687 (issued May 8, 2018).

of right knee replacement with pain. Initially, Dr. Reilly noted that appellant was seen for a right hip and low back evaluation and indicated that the pain had been going on for about a week and there was “[n]o specific injury.” In a March 31, 2016 progress report, he found that an x-ray of her hip was unremarkable. However, in a June 6, 2016 report, Dr. Reilly opined that appellant falling onto her buttocks at work on February 28, 2011, particularly since the impact was asymmetric to the left side, was consistent with a valgus impacted hip fracture. He disagreed with Dr. Crystal’s opinion regarding appellant’s x-rays. Dr. Reilly opined that there was subtle valgus alignment upon x-ray and asserted that there was no reason to conclude that there would still be evidence of the fracture on the MRI scan, with the clinical course for the injury at 5½ months and the bone scan at 11 months from the fracture. He further noted that Dr. Crystal’s opinion with regard to appellant’s left hip was in contradiction to four Board-certified orthopedic surgeons’ assessments and conclusions. Dr. Reilly concluded that appellant’s medical history and radiographic studies supported his opinion that she sustained a left hip fracture and required a right knee replacement as a result of her employment injury. The Board finds that Dr. Reilly failed to provide a well-rationalized explanation as to how and whether these conditions, which have not been accepted by OWCP, are causally related to the February 28, 2011 employment injury.⁹ Thus, his reports are of diminished probative value and are insufficient to overcome the special weight properly accorded to Dr. Crystal’s report as the impartial medical examiner or to create a new conflict.¹⁰

In his reports, Dr. Markowicz indicated that appellant had a unique history of having staged bilateral total knee replacements. He indicated that appellant fell at work on February 28, 2011 and was eventually “diagnosed with a femoral neck fracture, but it was well after the injury.” Dr. Markowicz found that there was a significant delay in diagnosis, but thankfully appellant’s fracture was nondisplaced and did heal. He opined that there was definitely a causal relationship between appellant’s injury and the fall at work resulting in her femoral neck fracture. Dr. Markowicz reported that the only trauma that appellant suffered was the fall at work on February 28, 2011 until she was diagnosed with femoral neck fracture. As he was on one side of the conflict, his reports, without more by way of medical rationale, are insufficient to create a new conflict in medical opinion to overcome the special weight properly accorded to Dr. Crystal.¹¹

Appellant further submitted evidence from a physician assistant. This document does not constitute competent medical evidence because a physician assistant is not considered a “physician” as defined under FECA.¹² Similarly, the EMG, nerve conduction studies, and MRI scans do not constitute competent medical evidence as they do not contain rationale by a physician

⁹ See *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (for conditions not accepted or approved by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence).

¹⁰ See *J.M.*, Docket No. 11-1257 (issued January 18, 2012); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹¹ *Id.*

¹² 5 U.S.C. § 8101(2); *Sean O’Connell*, 56 ECAB 195 (2004) (physician assistants). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

relating appellant's conditions to her employment.¹³ The Board, therefore, finds that this evidence is insufficient to establish appellant's claim.

The Board finds that Dr. Crystal's report continues to represent the special weight of the medical evidence as it was based on an accurate history, results of physical and diagnostic testing, and accompanied by a rationalized medical opinion. The report establishes that appellant's accepted conditions have resolved. As such, appellant has failed to meet her burden of proof to establish continuing disability or residuals causally related to the February 28, 2011 employment injury.

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 appellant has failed to meet her burden of proof to establish continuing employment-related disability or residuals effective January 3, 2013 causally related to the accepted February 28, 2011 employment injury.

¹³ See *Paul Foster*, 56 ECAB 208, 212 n.12 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2018
Washington, DC

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

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

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