United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 17-0805**
	)	**Issued: July 13, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Egg Harbor Township, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 28, 2017 appellant, through counsel, filed a timely appeal from a November 29, 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 17, 2016 because she no longer had

[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.*

residuals of the accepted conditions; and (2) whether appellant established that she had any continuing employment-related disability or condition after June 17, 2016 due to the accepted conditions.

FACTUAL HISTORY

On July 15, 2014 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her left ankle, left knee, and lower back when she slid and twisted her left lower extremity while delivering mail that day. She did not fall. Appellant returned to part-time modified duty on July 25, 2014, based on the opinion of Dr. Joseph S. Harhay, an attending Board-certified orthopedic surgeon, who diagnosed sprain and strain of medial collateral ligament of left knee, lumbar sprain and strain, and left ankle sprain and strain. On August 14, 2014 OWCP accepted a sprain and strain of the medial collateral ligament of left knee, lumbar sprain and strain, and left ankle sprain and strain. Appellant received continuation of pay followed by intermittent wage-loss compensation on the supplemental rolls commencing August 30, 2014.

Appellant continued treatment with Dr. Harhay, who also diagnosed lumbago and tear of the medial cartilage or meniscus of left knee. A February 18, 2015 lumbar spine magnetic resonance imaging (MRI) scan demonstrated disc bulging from T12 through L4 with a small right-sided herniation superimposed upon a bulge at L1-2, and a central herniation at L5-S1. The report noted that, when compared with a prior study done on April 18, 2013, the findings were unchanged with the exception of retrolisthesis at L2-3.

Appellant began treatment with Dr. Michael J. Mehnert, a Board-certified physiatrist. In reports dated March 3 and June 15, 2015, Dr. Mehnert provided physical examination findings. He diagnosed low back pain, degenerative disc disease of the lumbar spine, and acute left knee pain. On March 3, 2015 Dr. Mehnert advised that appellant's left knee pain was causally related to the July 2014 employment injury. He advised that he did not think she required work restrictions for her lumbar spine due to the employment injury. Dr. Mehnert recommended a left knee MRI scan and chronic pain management. On June 3, 2015 he noted that the lumbar MRI scan demonstrated a new retrolisthesis at L2-3, but no evidence of acute herniation or nerve root compression.

On July14, 2015 OWCP referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation. The questions provided Dr. Askin included whether the medical evidence indicated that appellant sustained other medical conditions caused by the July 15, 2014 employment injury.

By letter dated August 11, 2015, counsel noted that he had not been forwarded correspondence regarding scheduling a second opinion evaluation, and requested copies of the referral letter and the statement of accepted facts (SOAF).

Dr. Askin ordered a left knee MRI scan that was performed on August 31, 2015. This scan demonstrated blunting of the inner margin of the body of the lateral meniscus, likely related to an inner margin tear.

In a September 8, 2015 report, Dr. Askin noted that he had examined appellant on August 7, 2015. He described the July 15, 2014 work injury and appellant's current complaints of back and left knee pain and that she related a history of back pain dating back to 1991. He noted his review of the SOAF and the medical record. Left knee examination showed effusion and tenderness with no instability, patellar tracking abnormality, or ligamentous laxity present. Straight leg raising was negative to 90 degrees seated and sensation was preserved to light touch throughout both lower extremities. Back examination demonstrated pain at the sacral level and iliac spine tenderness with no muscle spasm. Spine range of motion was limited due to pain. Appellant had a mildly antalgic gait, favoring her left leg. Dr. Askin advised that the accepted ankle condition had resolved. He indicated that the February 18, 2015 MRI scan of the lumbar spine revealed gross degenerative disc disease involving all lumbar discs. Regarding the August 31, 2015 left knee MRI scan, Dr. Askin advised that the study did not reveal significant pathology such as effusion or significant internal derangement that would explain appellant's complaints or that were deserving of intervention. He indicated that there was nothing in the MRI scan indicating that the accepted condition was persistent. Dr. Askin opined that the July 15, 2014 work injury likely temporarily aggravated appellant's preexisting back condition, but that a material change did not occur, and that the available medical evidence did not indicate that she sustained any other medical condition due to the July 15, 2014 injury, noting that there was no significant meniscal tear present, and that arthroscopic surgery was not needed. He recommended that appellant lose weight and stop smoking. Dr. Askin concluded that she had reached maximum medical improvement (MMI) and could return to her date-of-injury job or any position that was less onerous.

On September 16, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Askin who advised that she had no residuals or disability due to the July 15, 2014 employment injury.

In September 28, 2015 correspondence, counsel disagreed with the proposed termination, asserting that Dr. Askin's opinion was contradictory and speculative.

In an October 12, 2015 treatment note, Dr. Mehnert noted that appellant had a history of prior problematic lumbar spine issues, in particular that her pain had increased since a fall on July 15, 2014. He reported that a left knee MRI scan showed blunting of the medial aspect of the left lateral meniscus, but did not clearly show evidence of a tear or other internal derangement and that a lumbar MRI scan demonstrated disc bulging at multiple levels with slight listhesis at L2-3, a right-sided herniation at L1-2, and a central herniation at L5-S1 with facet arthropathy. Dr. Mehnert performed physical examination and diagnosed low back pain, other lumbosacral disc degeneration, lumbar facet joint syndrome, and left knee pain. He advised that appellant could continue modified duty. Dr. Mehnert also provided an October 12, 2015 duty status report (Form CA-17) in which he advised that she could work two to four hours daily with no climbing, kneeling, bending, stooping, twisting, pushing, pulling, simple grasping, fine manipulation, reaching above the shoulder, driving a vehicle, operating machinery, working in temperature extremes or high humidity, and no exposure to chemicals, solvents, fumes, or noise. On November 11, 2015 he performed a lumbar epidural injection.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Harhay and Dr. Askin regarding whether a causal relationship existed between appellant's current condition and the July 15, 2014 employment injury and whether she continued to have employment-related disability. It referred her to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Fries was asked if appellant had a concurrent work-related aggravation of an existing condition.[3]

In a February 26, 2016 report, Dr. Fries noted the history of injury, medical treatment as related by appellant, and his review of the SOAF and the medical record. He described her complaints of constant lower lumbar spine pain bilaterally, that radiated down the left thigh and was aggravated by bending, stooping, squatting, and twisting, and also constant left knee pain, aggravated by climbing stairs and standing for several hours with an occasional give-way feeling. Orthopedic examination demonstrated that appellant was 60.5 inches tall and weighed 212 pounds. She wore a knee brace and walked with a slight limp. Knee extension was limited and lumbar spine range of motion was limited by pain. Gentle percussion caused lower lumbar spine pain, and there was lumbosacral interspace tenderness on examination. Seated straight leg raising was to 90 degrees bilaterally and appellant was unable to cross either leg due to low back pain, and her obese physique. Supine straight leg raising was 90 degrees on the right and 80 degrees on the left without provoked symptoms. Flexing her hips aggravated appellant's back pain. Left knee examination was stable to varus and valgus stress, but was limited by pain. There were no findings about the left ankle, with no swelling, full range of motion, no instability or tenderness, and no complaints. Thigh, knee, and calf circumferences were equal bilaterally. Dr. Fries reviewed x-rays taken on the date of injury, July 14, 2015, advising that the lumbar spine demonstrated multilevel degenerative changes, but no evidence of trauma. The left knee showed normal alignment, no joint space narrowing, and no evidence of trauma or effusion, and unremarkable soft tissues; the left ankle was unremarkable with no evidence of trauma. Dr. Fries also reviewed the August 31, 2015 left knee MRI scan. This showed mild signal changes in the posterior horn of the medial meniscus, but no tear and no evidence of trauma. Dr. Fries also reviewed a copy of images from the lumbar spine February 18, 2005 MRI scan, and indicated that these demonstrated significant degenerative changes at every level of the lower thoracic and lumbosacral spine with degenerative retrolisthesis of L2 on L3, significant narrowing of the L5-S1 disc with an associated small protrusion, and disc bulges at every level.

Dr. Fries diagnosed chronic low back pain with multilevel spinal degeneration and long-term opioid maintenance since before the work injury, with no clear evidence of radiculopathy, probable early arthritis of the medial compartment of the left knee, and gross exogenous obesity. He advised that appellant's left ankle complaints had fully resolved. Dr. Fries opined that, while appellant maintained that her back pain worsened after the July 15, 2014 incident, he found no objective findings to confirm a permanent injury on that date, noting that he was not provided a medical record prior to the employment injury. With regard to the left knee, he indicated that the MRI scan findings were likely degenerative and inconsistent with her complaint location. Dr. Fries found only subjective findings on his examination with no evidence of ligamentous

[3] Counsel was copied on the referral letter. The record contains an ME023 appointment scheduling form, copies of screen shots, and a bypass log, indicating that, prior to the selection of Dr. Fries, one physician was bypassed because he had passed away.

instability and no pain on stress of the medial collateral ligament. He advised that appellant had reached MMI, and the accepted conditions of left knee medial collateral ligament sprain, left ankle sprain, and lumbar sprain had all resolved and did not require further treatment. Dr. Fries concluded that, given the combination of chronic back and left ankle pain, and her obesity, it was unlikely she could return to unrestricted work duties, but could work a full eight-hour day with three hours of sedentary-type work. On an attached work capacity evaluation form (OWCP-5c) he advised that appellant could perform medium work for eight hours a day with permanent restrictions of no climbing with walking, standing, twisting, bending, and stooping limited to five hours daily.

By June 17, 2016 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that day. It found that the weight of the medical evidence rested with the opinion of Dr. Fries, the impartial medical examiner who advised that the accepted conditions had resolved.

Appellant, through counsel, timely requested a hearing before an OWCP hearing representative. In a treatment note dated August 10, 2016, Dr. Natacha S. Falcon, a Board-certified physiatrist, noted taking over care of appellant from Dr. Mehnert. She described the history of injury, appellant's history, and her complaint of back and left knee pain. Following examination Dr. Falcon diagnosed lumbar facet joint syndrome, other intervertebral disc degeneration of the lumbar region, axial low back pain, lumbar facet joint pain, disc bulges at L3-4 and L4-5, and L5-S1 moderate degenerative disc disease. She recommended left knee evaluation by a sports medicine physician and continued Dr. Mehnert's restrictions.

During the hearing, held on October 5, 2016, appellant testified regarding her work history, the employment injury, and her subsequent medical care. She stated that she suffered a back injury at home in 2013 and was still seeing a pain management specialist on July 15, 2014, the date of injury, but that her back pain increased on that date and had never lessened. Appellant additionally described continued problems with her left knee. She related that she continued to work modified, part-time duty. Counsel maintained that, because the appointment notice with Dr. Askin was not forwarded to counsel, his report should be excluded and in the alternative, it was of insufficient rationale to establish a medical conflict. He also asserted that the employment injury caused aggravation of preexisting lumbar conditions and a likely medial meniscus tear. Counsel concluded that, since Dr. Askin's report should be excluded, Dr. Fries' report was also insufficient to meet OWCP's burden to terminate or, in the alternative, a conflict in medical evidence had been created requiring referral for a new impartial evaluation.

Following the hearing, appellant forwarded an August 10, 2016 duty status report in which Dr. Falcon advised that appellant could sit, stand, and walk for 10 minutes per day, could not climb, kneel, bend, stoop, twist, push, or pull, could drive a vehicle 20 minutes, and could lift and carry 5 to 10 pounds for 5 to 6 hours daily. In an October 19, 2016 treatment note, Dr. Dennis Nutini, Board-certified in physiatry and sports medicine, noted seeing appellant for left knee pain. He noted that appellant had an employment injury on July 15, 2014 and that left knee x-rays that day did not show degenerative changes or decreased joint space on the left. Dr. Nutini reviewed the August 31, 2015 MRI scan and advised that he felt that it was consistent with a likely tear. On examination, he noted an antalgic gait with full range of knee motion bilaterally, trace effusion on the left with tenderness to palpation over the left medial joint line, a positive McMurray's, negative

Lachman's, and no pain or laxity with varus/valgus stress testing. Dr. Nutini diagnosed other tear of medial meniscus, current injury, left knee. He recommended modified duty with no frequent bending, stooping, kneeling, squatting, or climbing.

By decision dated November 29, 2016, an OWCP hearing representative affirmed the June 17, 2016 decision. She found that, while OWCP neglected to send the notice of an appointment with Dr. Askin to counsel, it had informed him of the appointment, and counsel did not note objections regarding the examination or argue that a new second opinion examination should be arranged prior to the hearing. The hearing representative noted that Dr. Fries gave a rationalized opinion that the accepted conditions had resolved without residuals, that there was no evidence that appellant sustained other injuries on July 15, 2014, and was based on an accurate and complete factual and medical background. She concluded that his report constituted the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[6] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.[7]

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.[8] The implementing regulation states 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.[9] 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,

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

[5] *Id.*

[6] *See T.P.*, 58 ECAB 524 (2007).

[7] *See I.J.*, 59 ECAB 408 (2008).

[8] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[9] 20 C.F.R. § 10.321.

the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to justify its termination of appellant's wage-loss compensation and medical benefits.

The Board initially notes that, while counsel was not notified of the second opinion evaluation appointment with Dr. Askin, counsel's correspondence dated August 11, 2015 supports that he had actual knowledge of the scheduled evaluation. The Board has held that where, as here, a representative had actual knowledge of a scheduled examination, the lack of proper notice was harmless error.[11] Herein, as counsel merely maintained that Dr. Askin's opinion was contradictory and speculative prior to the June 17, 2016 termination, but did not assert that his report should be excluded until the October 5, 2016 oral hearing, OWCP's failure of notification is deemed harmless error, and Dr. Askin's report need not be excluded.[12]

OWCP accepted appellant's claim for left medial collateral ligament strain, lumbar sprain, and left ankle sprain. It terminated her wage-loss compensation and medical benefits on June 17, 2016 based on the opinion of Dr. Fries who advised that the accepted conditions had resolved.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Harhay and Dr. Askin regarding whether a causal relationship existed between appellant's current condition and the July 15, 2014 employment injury and whether she continued to have employment-related disability. It referred her to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Fries was asked if appellant had a concurrent work-related aggravation of an existing condition.[13]

In his comprehensive February 26, 2016 report, Dr. Fries described the relevant facts and evaluated the course of appellant's employment-related conditions. He noted that appellant had preexisting back pain that had remained worse since the July 15, 2014 injury, but found no objective findings to confirm permanent injury at the time of his examination. Dr. Fries further advised that appellant had no significant imaging findings to explain her continued left knee symptoms, and that the minor lateral meniscus findings were most likely degenerative and inconsistent with her complaints. He found no instability and no pain on stress of the medial collateral ligament and concluded that any residuals of appellant's accepted conditions had

[10] *V.G.*, 59 ECAB 635 (2008).

[11] *I.H.*, Docket No. 09-0141 (issued August 6, 2009).

[12] *See P.C.*, Docket No. 16-1714 (issued October 18, 2007).

[13] Counsel was copied on the referral letter. The record contains an ME023 appointment scheduling form, copies of screen shots, and a bypass log, indicating that, prior to the selection of Dr. Fries, one physician was bypassed because he had passed away.

resolved, and any disability was due to a combination of chronic pain and appellant's weight, and not to the accepted conditions.

The Board finds that Dr. Fries provided a comprehensive, well-rationalized opinion in which he clearly advised that appellant's accepted conditions had resolved without residuals. Dr. Fries' well-rationalized opinion, therefore, constitutes the special weight accorded an impartial examiner with regard to appellant's accepted conditions.[14]

The medical evidence appellant submitted before the June 17, 2016 termination of wage-loss compensation and medical benefits was insufficient to overcome the weight accorded Dr. Fries as impartial specialist.

In his October 12, 2015 reports, Dr. Mehnert described physical examination findings and noted left knee and lumbar spine MRI scan findings. He diagnosed low back pain, other lumbosacral disc degeneration, lumbar facet joint syndrome, and left knee pain and advised that appellant could work for two to four hours of modified duty daily. While Dr. Mehnert briefly referenced a July 15, 2014 fall at work, appellant did not fall, but merely slipped. Moreover, the conditions diagnosed by Dr. Mehnert have not been accepted as employment related. The Board has long held that rationalized medical opinion evidence is medical evidence based on a complete factual and medical background of reasonable medical certainty and supported by medical rationale explaining the opinion offered. Dr. Mehnert based this opinion on an incorrect history of injury and did not provide a rationalized medical opinion as to why any diagnosed conditions were caused by the July 15, 2014 slip at work.[15]

The Board, therefore, concludes that Dr. Fries' opinion that appellant had recovered from the accepted conditions is entitled to the special weight accorded an impartial medical examiner,[16] and the additional medical evidence submitted is insufficient to overcome the weight accorded him regarding whether appellant had residuals of her accepted conditions. OWCP, therefore, properly terminated appellant's wage-loss compensation and medical benefits, effective June 17, 2016.[17]

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits effective June 17, 2016, the burden shifted to her to establish that she had any continuing disability causally related to the accepted conditions.[18] Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the

[14] *See H.A.*, Docket No. 16-1184 (issued April 20, 2017).

[15] *See A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[16] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[17] *Manuel Gill*, 52 ECAB 282 (2001).

[18] *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[19]

ANALYSIS -- ISSUE 2

The Board finds that the medical evidence of record submitted after the June 17, 2016 termination is insufficient to establish that she continued to be disabled from work due to the accepted conditions.

Following the termination of wage-loss compensation and medical benefits on July 17, 2016, appellant submitted an August 10, 2016 report in which Dr. Falcon noted that appellant slipped at work on July 15, 2014. She recorded appellant's complaint of back and left knee pain. Following examination, Dr. Falcon diagnosed lumbar facet joint syndrome, other intervertebral disc degeneration of the lumbar region, axial low back pain, lumbar facet joint pain, disc bulges at L3-4 and L4-5, and L5-S1 moderate degenerative disc disease. Dr. Nutini, who saw appellant on October 19, 2016, noted that appellant had a work injury on July 15, 2014. He indicated that left knee x-rays that day did not show degenerative changes or decreased joint space on the left and reviewed the August 31, 2015 MRI scan. Dr. Nutini advised that he felt that appellant likely had a tear and diagnosed other tear of medical meniscus, current injury, left knee. He recommended modified duty.

Dr. Falcon merely mentioned that a July 15, 2014 work injury occurred when appellant did not fall, and Dr. Nutini merely mentioned a work injury on July 15, 2014 without a specific description of the injury. Neither physician provided an explanation as to how or why their diagnosed conditions, which have not been accepted, were caused by the July 2014 employment injury. A medical opinion not fortified by medical rationale is of little probative value.[20]

As there is no medical evidence of record of sufficient rationale to establish that appellant continued to be disabled from work due to the July 15, 2014 work injury, she has not met her burden of proof to establish continuing employment-related disability after July 17, 2016.[21]

On appeal counsel asserts that additional conditions of aggravation of preexisting lumbar conditions and a left knee meniscus tear should be accepted. He maintains that the opinions of OWCP referral physicians are insufficient to carry the weight of the medical evidence such that the termination should be reversed or, in the alternative, a conflict in medical evidence has been created.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on June 17, 2016. It further finds that she did not establish

[19] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[20] *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[21] *G.H.*, Docket No. 16-0432 (issued October 12, 2016).

continuing employment-related disability after that date causally related to the July 15, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2018
Washington, DC

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

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

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