United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 18-1228**
	)	**Issued: March 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Woodbridge, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 31, 2018 appellant, through counsel, filed a timely appeal from a January 3, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (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] The record also contains an April 24, 2018 decision terminating appellant's wage-loss compensation and medical benefits, effective that date, as he had no further residuals or disability due to his accepted work injury. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. §§ 501.2(c), 501.3.

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that the acceptance of his claim should be expanded to include cervical spondylosis without myelopathy, cervical radiculopathy, a herniated cervical disc, and lumbar radiculopathy causally related to the August 12, 2014 employment injury.

FACTUAL HISTORY

On August 12, 2014 appellant, then a 60-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured the right side of his body from the back of his head to his foot, when his foot slipped off a bumper while he was in the performance of duty. He stopped work on August 13, 2014. OWCP initially accepted the claim for neck sprain and sprains of the right knee, right hip and thigh, right shoulder, right foot, and right ankle. It subsequently expanded acceptance of the claim to include advanced degenerative arthritis of the right acromioclavicular (AC) joint, a tear of the right medial meniscus, an aggravation of preexisting osteoarthritis of the right knee, osteoarthritis of the right shoulder, and an aggravation of preexisting severe degenerative disc disease at C5-6 and C6-7. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls beginning September 27, 2014 and on the periodic rolls beginning December 14, 2014.

On December 3, 2014 Dr. James E. Patti, a Board-certified orthopedic surgeon, evaluated appellant for pain in his cervical spine. He noted that appellant had injured his neck at work on August 12, 2014 when he slipped getting into his truck. Dr. Patti diagnosed cervical spondylosis with myelopathy, cervical radiculopathy, and neck sprain.

In December 29, 2014 and January 22, 2015 attending physician's reports (Form CA-20), Dr. Patti diagnosed cervical spondylosis, cervical radiculopathy, and neck sprain and checked a box marked "yes" that the condition was caused or aggravated by employment as it occurred at work.

On February 18, 2015 Dr. Patti diagnosed a cervical herniated nucleus pulposus (HNP) and noted that electrodiagnostic testing performed February 11, 2015 revealed probable radiculopathy on the right at L4-5.[4]

OWCP on February 26, 2015 referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation. It requested that Dr. Askin address the extent of appellant's current disability and need for further medical treatment.

In a report dated March 13, 2015, Dr. Askin noted that OWCP had accepted as employment-related sprains of the neck, right knee, right ankle, right hip and thigh, right shoulder, right foot, and a right medial meniscal tear. He found that appellant had no residuals of his accepted work injury. Dr. Askin asserted that appellant had preexisting right knee osteoarthritis and that his fall had increased his discomfort without altering the "baseline condition."

[4] Dr. Patti continued to submit progress reports regarding his treatment of appellant for a cervical condition.

In a progress report dated February 1, 2016, Dr. Patti diagnosed cervical spondylosis, cervical radiculopathy, a cervical herniated disc, neck sprain, and lumbar spondylosis causally related to appellant's August 12, 2014 employment injury.[5] He requested authorization for surgery on the cervical spine. On April 13, 2016 Dr. Patti requested that OWCP expand acceptance of appellant's claim to include cervical spondylosis, cervical radiculopathy, and a cervical herniated disc as "directly causally related to [appellant's] injury of August 12, 2014."[6]

OWCP determined that a conflict in medical opinion existed regarding appellant's current condition and disability from employment and whether he had sustained additional conditions as a result of his August 12, 2014 employment injury and the extent of his disability. It referred appellant to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

On July 28, 2016 Dr. Krisiloff opined that the accepted sprains of the right knee, right shoulder, cervical spine, lumbar spine, and ankle had resolved. He advised that the right knee osteoarthritis did not result from the work injury. Dr. Krisiloff related, "As far as the cervical and lumbar spine are concerned, in this case the initial sprain which was accepted as a condition after [appellant's] initial injury in 2014 has in my opinion resolved, and any further treatment regarding the neck or lower back would be due to his underlying degenerative disc disease and arthritis and is not related in any way to the initial injury." He opined that appellant's cervical spondylosis had not resulted from his 2014 work injury and that the proposed cervical spine surgery was not medically necessary or due to his employment. Dr. Krisiloff asserted that appellant had no additional conditions arising from the August 12, 2014 employment injury.

In a report dated September 16, 2016, Dr. Patti again advised that the proposed anterior cervical decompression and fusion at C5-6 and C6-7 was medically necessary to treat appellant's cervical spondylosis, cervical radiculopathy, and cervical herniated disc.[7] He opined that the diagnosed conditions were causally related to appellant's August 12, 2014 employment injury.

On December 28, 2016 appellant notified OWCP that he had retired from the employing establishment, requested that it stop his wage-loss compensation, effective December 31, 2016, and also requested an election of benefits form. He subsequently provided a completed election form specifying that he wanted to receive retirement benefits in lieu of wage-loss compensation benefits under FECA.

[5] On April 14, 2016 Dr. Patti indicated that he had treated appellant beginning December 3, 2014 for injuries from his August 12, 2014 employment injury. He advised that appellant complained of pain in his back at the time of the December 3, 2014 evaluation. Dr. Patti diagnosed lumbar spondylosis, lumbar radiculopathy, and lumbar spinal stenosis due to appellant's August 12, 2014 work injury. He provided a similar report on June 20, 2016.

[6] Dr. Patti on April 14, 2016 requested authorization for an anterior cervical decompression and fusion at C5-6 and C6-7, noting that the treatment was medically necessary and causally related to appellant's August 12, 2014 employment injury.

[7] In a September 12, 2016 progress report, Dr. Patti diagnosed cervical spondylosis, cervical radiculopathy, a traumatic herniated cervical disc, neck sprain, and lumbar spondylosis which he attributed to the August 12, 2014 employment injury. He continued to submit progress reports and CA-20 forms.

OWCP on January 11, 2017 determined that a conflict in medical opinion existed regarding appellant's current condition and disability from employment and whether he had sustained additional conditions as a result of his August 12, 2014 employment injury. It found that Dr. Askin had not addressed all the accepted conditions in his report and that his report was consequently insufficient to create a conflict in medical opinion. OWCP thus found that Dr. Krisiloff was a second opinion examiner.

By letter dated April 20, 2017, counsel noted that he no longer received workers' compensation benefits. He requested that OWCP schedule a referee opinion regarding claim expansion and authorization for surgery.

OWCP on May 2, 2017 referred appellant to Dr. Dean Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination. It mailed the referral letter to counsel at his address of record.

In a report dated May 29, 2017, Dr. Carlson reviewed the history of injury and appellant's current complaints of pain in the right knee, neck, low back, right hip, right shoulder, and right ankle. On examination, he measured range of motion of the back, neck, hips, shoulders, ankles, wrists, and thumbs. Dr. Carlson found no tenderness of the cervical or lumbar spine and full motor strength on flexion and extension. He diagnosed as primary conditions right shoulder glenohumeral osteoarthritis, right knee osteoarthritis, and severe degenerative arthritis of the cervical spine at C5-6 and C6-7. Dr. Carlson also diagnosed cervical spine degenerative arthritis, or spondylosis, which he opined was not employment related. He related, "The sprain of the cervical spine likewise aggravated the advanced C5-6, C6-7 degenerative arthritis. The acute sprain subsided, but the degenerative spondylosis progresses, causing chronic pain and stiffness." Dr. Carlson identified the diagnosis code for the cervical spine degenerative arthritis, or spondylosis, using the International Classification of Diseases, Tenth Revision (ICD-10) as Code M47.812. He attributed appellant's current cervical condition to preexisting cervical osteoarthritis, noting that the cervical sprain superimposed on the C5-6 and C6-7 osteoarthritis would have resolved within a year of the injury. Dr. Carlson related:

> "The cervical spondylosis is a preexisting condition and should not be accepted as an expansion of [appellant's] cervical sprain. I find no subjective complaints nor dermatomal radiation of symptoms nor motor weakness to consider cervical radiculopathy. I would not consider expanding his diagnosis to include the [magnetic resonance imaging scan study] degenerative disc condition. There are no additional conditions that should be accepted."

Dr. Carlson opined that the requested anterior cervical decompression and fusion was not warranted as the cervical disc degeneration was not employment related.

On January 2, 2018 OWCP expanded acceptance of appellant's claim to include an aggravation of preexisting right knee osteoarthritis and an aggravation of preexisting severe degenerative disc disease at C5-6 and C6-7, which it identified as ICD-10 Code M51.36.

By decision dated January 3, 2018, OWCP denied expansion of the acceptance of appellant's claim to include cervical spondylosis without myelopathy, cervical radiculopathy, a cervical HNP of a cervical intervertebral disc, and lumbar radiculopathy.

LEGAL PRECEDENT

An employee seeking benefits under FECA[8] has the burden of proof to establish the essential elements of his or her claim, including the fact that he or she is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[9] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[10]

Where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[11] To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[12] 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 nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.

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.[14] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[15] Where OWCP has referred the case to an impartial medical examiner (IME) to

[8] *Supra* note 3.

[9] *See C.W.*, Docket No. 17-1636 (issued April 25, 2018).

[10] *See J.S.*, Docket No. 18-1085 (issued February 12, 2019).

[11] *See T.F.*, Docket No. 17-0645 (issued August 15, 2018).

[12] *See S.A.*, Docket No. 18-0399 (issued October 16, 2018).

[13] *See P.M.*, Docket No. 18-0287 (issued October 11, 2018).

[14] 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[15] *C.H.*, Docket No .18-1065 (issued November 29, 2018).

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.[16]

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.[17]

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether the acceptance of appellant's claim should be expanded to include cervical spondylosis without myelopathy, cervical radiculopathy, a herniated cervical disc, and lumbar radiculopathy causally related to his August 12, 2014 employment injury.

OWCP accepted that on August 12, 2014 appellant sustained cervical sprain and sprains of the right knee, right hip and thigh, right shoulder, right foot, and right ankle, advanced degenerative arthritis of the right AC joint, a tear of the right medial meniscus, and osteoarthritis of the right shoulder. On January 2, 2018 it expanded acceptance of the claim to include preexisting osteoarthritis of the right knee and an aggravation of preexisting severe degenerative disc disease at C5-6 and C6-7.

OWCP properly determined that a conflict arose between Dr. Krisiloff, an OWCP referral physician, and Dr. Patti, appellant's attending physician, regarding whether his claim should be expanded to include additional conditions, in particular cervical spondylosis, cervical radiculopathy, and a traumatic cervical HNP. It referred him to Dr. Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination.

Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[18] The Board finds, however, that Dr. Carlson's opinion is insufficient to resolve the conflict in medical opinion.

On May 29, 2017 Dr. Carlson provided examination findings of full motor strength with no cervical or lumbar tenderness. He diagnosed osteoarthritis of the right shoulder and right knee and severe degenerative arthritis of the cervical spine at C5-6 and C6-7, which he identified using ICD-10 Code M47.812. Dr. Carlson also diagnosed multiple resolved and nonemployment-related conditions, including degenerative arthritis of the cervical spine, or spondylosis, without radiculopathy, which he opined was not employment related. He found that appellant's accepted cervical sprain had aggravated his C5-6 and C6-7 degenerative arthritis and that the aggravation had resolved within 12 months of the injury. Dr. Carlson further opined that appellant did not have cervical radiculopathy or any additional employment-related conditions. He advised that he did

[16] *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

[17] *See R.T.*, Docket no. 17-0925 (issued December 14, 2017).

[18] *See A.E.*, Docket No. 18-0891 (issued January 22, 2019).

not require surgery as a result of the work injury as the underlying cervical disc degeneration was not related to his employment and as any aggravation of the condition resolved within a year of the injury.

Based on Dr. Carlson's report, OWCP expanded acceptance of appellant's claim to include an aggravation of preexisting degenerative disc disease at C5-6 and C6-7, which it identified using ICD-10 Code M51.36. It denied expansion of his claim to include cervical spondylosis without myelopathy. Dr. Carlson, however, identified the relevant cervical diagnosis as ICD-10 Code M47.812, which is spondylosis without myelopathy or radiculopathy of the cervical region. The ICD-10 Code used by OWCP to expand acceptance of the claim, ICD-10 code M51.36, is used for the diagnosis of an aggravation of other intervertebral disc degeneration of the lumbar region. OWCP has failed to explain why it used a diagnosis other than that provided by Dr. Carlson or why it used an ICD-10 code relevant to the lumbar spine when it expanded acceptance of appellant's cervical condition. It is therefore unclear what condition OWCP has accepted based on Dr. Carlson's report.

Additionally, the Board notes that Dr. Carlson's report is internally inconsistent as he found that appellant's degenerative arthritis of the cervical spine, or spondylosis without radiculopathy was not employment related and that OWCP should not accept any additional employment-related conditions.[19] Dr. Carlson further found, however, that appellant's employment-related cervical sprain had temporarily aggravated his degenerative arthritis at C5-6 and C6-7.

As noted, the Board has held that, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.[20] Consequently, the Board finds that the case must be remanded to OWCP. On remand, OWCP should request that Dr. Carlson clarify whether the acceptance of appellant's claim should be expanded to include either a temporary or permanent aggravation of a cervical condition. It should additionally request that Dr. Carlson specifically address whether the acceptance of the claim should be expanded to include lumbar radiculopathy. Following this and any further development deemed necessary, it shall issue a *de novo* decision.[21]

CONCLUSION

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

[19] *See generally W.H.*, Docket No. 16-1047 (issued October 25, 2016).

[20] *See J.S.*, Docket No. 17-0626 (issued January 22, 2019).

[21] On appeal counsel argues that he did not receive a copy of OWCP's referral of appellant to Dr. Carlson. It appears from a review of the record that OWCP sent a copy of the May 2, 2017 referral letter to counsel at his address of record and there is no evidence that it was returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient. *C.S.*, Docket No. 17-0167 (issued April 11, 2018). This is commonly referred to the mailbox rule. It arises when the record reflects that the notice was properly addressed and duly mailed. *See V.H.*, Docket No. 18-1124 (issued January 16, 2019). The current record is devoid of evidence to rebut the presumption that counsel did not received a copy of the May 2, 2017 letter referring appellant to Dr. Carlson.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 8, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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