United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 18-1808**
	)	**Issued: May 16, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Daniel B. Shapiro, 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 September 28, 2018 appellant, through counsel, filed a timely appeal from an April 3, 2018 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.[3]

[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.*

[3] Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated April 4, 2019, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-1808 (issued April 4, 2019).

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include acceleration or permanent aggravation of left knee osteoarthritis causally related to the accepted employment injuries; and (2) whether OWCP abused its discretion in denying appellant's request for subpoenas.

FACTUAL HISTORY

On August 7, 2014 appellant, then a 61-year-old retired mail handler/custodian, filed an occupational disease claim (Form CA-2) alleging that she sustained employment-related acceleration of the preexisting osteoarthritis in both her knees. She indicated that she first became aware of her claimed condition and realized its relation to her federal employment on June 3, 2014. Appellant retired on January 31, 2013.

In an accompanying narrative statement, appellant advised that, when she worked as a mail handler from 1986 to 2008, her duties included loading and unloading mail from trucks, sorting mail trays, placing mail in containers, picking up sacks and tubs of mail weighing up to 70 pounds, throwing bundles of magazines into containers, operating an automated package processing machine, and carrying mail to conveyer belts. She advised that these duties required bending, twisting, turning, lifting, pushing, and pulling.[4] Appellant indicated that, when she worked as a janitor from 2008 to 2013, her duties included sweeping, mopping, dusting, cleaning bathrooms, washing windows, emptying trash, stripping/waxing floors, and shoveling snow.[5]

Appellant submitted several reports from Dr. Sharon A. Stotsky, a Board-certified rheumatologist, including an October 1, 2010 report in which Dr. Stotsky indicated that appellant had psoriatic arthritis which caused symptoms in both hips and knees. In a July 15, 2011 report, Dr. Helene E. Feiter, an attending Board-certified orthopedic surgeon, advised that appellant had inflammatory arthritis and lateral joint space narrowing with a history of psoriasis. On May 11, 2012 she diagnosed moderate-to-severe patellofemoral degenerative joint disease.

In a July 31, 2014 report, Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, reported the findings of the physical examination he conducted on June 3, 2014. Appellant's right knee exhibited marked tenderness to palpation along the lateral joint line and there was a palpable effusion of the knee. Dr. Hartunian indicated that her left knee exhibited moderate tenderness to palpation along the lateral joint line and also had a palpable effusion. He diagnosed primary right knee joint arthritis with no cartilage interval at the lateral femorotibial joint, and primary left knee joint arthritis with two millimeter cartilage interval at the lateral femorotibial joint. Dr. Hartunian summarized a number of periodical articles discussing knee osteoarthritis, and he concluded that appellant's work activities, including bending, kneeling,

[4] Appellant indicated that all of these duties were performed while walking or standing on a cement floor, except the time she sat at the automated package processing machine (up to four hours per day).

[5] Appellant attached job descriptions of the mail handler and custodian positions.

lifting/carrying, twisting, and squatting, contributed to the acceleration of her bilateral knee osteoarthritis.

OWCP referred appellant's case to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, and requested that he provide an opinion regarding whether appellant had an employment-related bilateral knee condition. In a March 27, 2015 report, Dr. Slutsky indicated that he was unable to render an opinion based on the evidence of record. OWCP then referred the case to Dr. David I. Krohn, a Board-certified internist, who also served as an OWCP medical adviser. In an April 22, 2015 report, Dr. Krohn discussed the medical evidence of record, including Dr. Hartunian's July 31, 2014 report, and indicated that the evidence was insufficient to establish appellant's claim for a bilateral knee condition.[6]

In May 2015, OWCP referred appellant and the case record for a second opinion examination to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, and requested that he provide an opinion regarding whether she sustained employment-related acceleration or aggravation of the preexisting osteoarthritis in her knees.

In a July 30, 2015 report, Dr. Geary detailed appellant's factual and medical history and reported the findings of the physical examination he carried out on June 24, 2015. He noted that she walked with a mildly antalgic gait favoring her right knee and indicated that her right knee showed approximately 10 degrees of valgus. Appellant's right knee was "quite tender" to palpation over the lateral joint line and it exhibited extensive crepitus upon range of motion testing. Dr. Geary advised that her left knee displayed some crepitus upon range of motion testing (less than in the right knee) and that it exhibited mildly positive patellofemoral signs. He indicated that he did not believe that appellant's bilateral knee osteoarthritis was caused or permanently accelerated by her work activities. Appellant's underlying psoriatic arthritis and osteoarthritis were temporarily aggravated by her work activities, but this aggravation ceased by the time she stopped work. Dr. Geary opined that the natural progression of her underlying psoriatic arthritis/osteoarthritis was the cause of her current bilateral knee condition.

By decision dated August 4, 2015, OWCP denied appellant's claim for employment-related bilateral knee osteoarthritis, finding that the medical evidence of record was insufficient to establish causal relationship between her claimed condition and the accepted employment factors (including engaging in lifting, carrying, twisting, stopping, standing, and walking). It determined that the weight of the medical evidence rested with the opinion of Dr. Geary, who determined that she did not have an employment-related bilateral knee condition.

On August 18, 2015 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. However, prior to a hearing, the hearing representative issued a December 9, 2015 decision which set aside OWCP's August 4, 2015 decision and remanded the case to OWCP for further development. She directed OWCP to obtain a supplemental report from Dr. Geary which clarified whether appellant's current bilateral knee condition could be solely due to psoriatic arthritis.

[6] OWCP provided Dr. Slutsky and Dr. Krohn with a March 25, 2015 statement of accepted facts (SOAF).

On remand, OWCP requested that Dr. Geary provide a supplemental report in accordance the directive of OWCP's hearing representative. In a September 16, 2016 report, Dr. Geary indicated that, most likely, appellant's right knee condition was due to both psoriatic arthritis and osteoarthritis. He noted that he did not believe that there was any causal relationship between her work duties and her development of bilateral knee arthritis.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Hartunian and Dr. Geary regarding whether appellant had an employment-related bilateral knee condition. It referred her and the case record to Dr. Joseph Abate, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she sustained employment-related acceleration or permanent aggravation of the preexisting osteoarthritis in her knees.

In a July 6, 2017 report, Dr. Abate discussed appellant's factual and medical history, noting that he had reviewed the description of her federal work duties in the March 25, 2015 SOAF. He indicated that she underwent a total right knee replacement surgery in December 2015[7] and noted that, since that time, she had regained ambulatory activities of both knees with good motion and minimal swelling/pain. Dr. Abate indicated that, upon examination, appellant exhibited no atrophy or deformity of either lower extremity, her left knee exhibited no instability, swelling, or effusion, and there was full flexion and extension of her left knee. He also noted mild patellofemoral crepitation in the left knee. Dr. Abate diagnosed permanent traumatic acceleration of the right knee (mixed psoriatic and osteoarthritis) with postop total knee arthroplasty, and temporary traumatic aggravation of the left knee (mixed psoriatic and osteoarthritis).

Dr. Abate noted that appellant's right knee exhibited significantly more limitations than her left knee during the 26 years she worked for the employing establishment. He indicated that her left knee symptoms improved to normal activities. Dr. Abate noted that, given the moderate degenerative condition of appellant's right knee with increasing symptoms, he believed that she sustained a permanent acceleration of degenerative arthritis of her right knee as a direct result of her work duties. He further opined that, based on the physical examination and review of the submitted medical records, she sustained a temporary aggravation of her left knee condition which resolved by her January 31, 2013 retirement and which left no greater impairment than existed prior to her federal employment. Dr. Abate noted that he did not agree with Dr. Hartunian's opinion that the arthritic condition of appellant's left knee was permanent as symptoms and restrictions of the left knee improved after her retirement on January 30, 2013.

By decision dated August 15, 2017, OWCP notified appellant that the claim had been accepted for acceleration of preexisting degenerative arthritis of the right knee, and temporary aggravation of preexisting degenerative arthritis of the left knee (resolved January 31, 2013).

By separate decision dated August 15, 2017, OWCP denied appellant's claim for acceleration or permanent aggravation of degenerative arthritis of the left knee, finding that the special weight of the medical opinion evidence rested with the well-rationalized July 6, 2017 opinion of Dr. Abate, the impartial medical specialist.

[7] The case record does not contain a copy of appellant's right knee surgery operative report.

On October 19, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Appellant, through counsel, requested the issuance of subpoenas to compel Drs. Krohn, Geary, and Abate to testify during the oral hearing. Counsel asserted that the anticipated testimony of these physicians would not duplicate evidence already in the record.

In a December 12, 2017 informational letter, OWCP's hearing representative denied appellant's request for subpoenas. In denying the request, she explained that appellant had not demonstrated that evidence from Drs. Krohn, Geary, and Abate could not be obtained without the use of subpoenas, including obtaining such evidence in writing if further clarification was deemed necessary to resolve the underlying issue of the present case. The hearing representative indicated that her denial of appellant's subpoena request did not constitute a formal, appealable decision, and advised that any unfavorable decision issued after the requested hearing was held would contain a specific finding on the subpoena matter.

In a January 14, 2018 statement, appellant asserted that she sustained a permanent employment-related aggravation of her left knee condition. In late-January 2018, her request for an oral hearing was converted to a request for a review of the written record by OWCP's hearing representative.

By decision dated April 3, 2018, OWCP's hearing representative affirmed the August 15, 2017 decision denying appellant's claim for acceleration or permanent aggravation of preexisting degenerative arthritis of the left knee. The hearing representative also finalized its prior denial of appellant's request for issuance of subpoenas to Drs. Krohn, Geary, and Abate.

LEGAL PRECEDENT -- ISSUE 1

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

The medical evidence required to establish causal relationship between a claimed specific condition and/or period of disability and an employment injury is rationalized medical opinion evidence. 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

[8] *J.F.*, Docket No. 09-1061 (issued November 17, 2009). *See also J.T.*, Docket No. 17-0578 (issued December 6, 2017).

[9] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

The Board has held that where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.[11] However, the normal progression of untreated disease cannot be stated to constitute "aggravation" of a condition merely because the performance of normal work duties reveals the underyling condition.[12]

Section 8123(a) of FECA provides in pertinent part: "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."[13] 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.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish acceleration or permanent aggravation of left knee osteoarthritis due to factors of her federal employment.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Hartunian, an attending physician, and Dr. Geary, an OWCP referral physician, on the issue of whether appellant sustained acceleration or permanent aggravation of left knee osteoarthritis due to factors of her federal employment. In order to resolve the conflict, it properly referred her Dr. Krohn, pursuant to section 8123(a) of FECA, to Dr. Abate for an impartial medical examination and an opinion on the matter.[15]

The Board finds that the special weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Abate, the impartial medical specialist selected to resolve the conflict in the medical opinion.[16] The July 6, 2017 report of Dr. Abate establishes that appellant only sustained a temporary aggravation of preexisting degenerative arthritis of the left knee.

[10] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[11] *C.H.*, Docket No. 17-0488 (issued September 12, 2017).

[12] *Id.*

[13] 5 U.S.C. § 8123(a).

[14] *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[15] *See supra* note 13.

[16] *See supra* note 14.

In a July 6, 2017 report, Dr. Abate discussed appellant's factual and medical history, noting that he had reviewed the description of her federal work duties in the March 25, 2015 SOAF. He indicated that her current left knee examination revealed no instability, swelling, or effusion, and that she had left knee full extension and flexion. Dr. Abate diagnosed permanent traumatic acceleration of the right knee (mixed psoriatic and osteoarthritis) with postoperative total knee arthroplasty, and temporary traumatic aggravation of the left knee (mixed psoriatic and osteoarthritis). He noted that appellant's right knee exhibited significantly more limitations than her left knee during the 26 years she worked for the employing establishment, and he indicated that her left knee symptoms improved to normal activities. Dr. Abate opined that, based on the physical examination and review of the submitted medical records, appellant sustained a temporary aggravation of her left knee condition which had resolved by her January 31, 2013 retirement and which left no greater impairment than what existed prior to her federal employment.[17]

The Board has reviewed the opinion of Dr. Abate and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Abate provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion that appellant only sustained a temporary aggravation of her underlying left knee degenerative condition by noting that the limitations of her left knee condition were significantly less than those of her right knee over the course of her employment and that her left knee condition greatly improved after her retirement on January 31, 2013.

On appeal, counsel argues that, in denying appellant's claim for acceleration or permanent aggravation of left knee osteoarthritis, OWCP improperly assessed the substance and content of medical reports of record, particularly those of OWCP's referral physician, Dr. Geary, and that impartial medical specialist, Dr. Abate. However, the Board has explained that the opinion of Dr. Geary created a conflict in the medical opinion evidence on the underlying issue of the case and that the opinion of Dr. Abate was sufficiently well rationalized to resolve that conflict.

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[18] The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[19] Abuse of discretion is generally shown through proof of manifest error, a

[17] Dr. Abate further noted that he did not agree with Dr. Hartunian's opinion that the arthritic condition of appellant's left knee was permanent as symptoms and restrictions of the left knee improved after appellant's retirement on January 30, 2013.

[18] *See* 20 C.F.R. § 10.619.

[19] *See id*.

clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[20]

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative did not abuse her discretion when she denied appellant's subpoena requests for the testimony of Drs. Krohn, Geary, and Abate. In denying the request, the hearing representative explained that appellant had not demonstrated that evidence from Drs. Krohn, Geary, and Abate could not be obtained without the use of subpoenas, including obtaining such evidence in writing if further clarification was deemed necessary to resolve the underlying issue of the present case. The Board finds that there is no reason to find that the hearing representative's denial of appellant's request for subpoenas constituted an abuse of discretion under the above-noted standard.[21]

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 not met her burden of proof to establish that the acceptance of her claim should be expanded to include acceleration or permanent aggravation of left knee osteoarthritis causally related to the accepted employment injuries. The Board further finds that OWCP did not abuse its discretion in denying her request for subpoenas.

[20] *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

[21] *See id*.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 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