United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 19-1510**
	)	**Issued: February 12, 2020**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, New York, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 8, 2019 appellant, through counsel, filed a timely appeal from a May 7, 2019 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 has met her burden of proof to establish a knee injury causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On November 24, 2015 appellant, then a 55-year-old management/program assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained a meniscus tear of her left knee due to receiving, packing, and shipping boxes/cases to the service center while in the performance of duty.[3] She indicated that she first became aware of her claimed injury on April 14, 2015 and first realized its relation to factors of her federal employment on November 18, 2015. Beginning in May 2015, appellant periodically stopped work to seek medical care for her left knee condition.[4]

In an accompanying statement, appellant indicated that, beginning in October 2000, she handled boxes for two to four hours at a time at least three times per week. She advised that these boxes weighed approximately 10 to 25 pounds and that handling the boxes required bending, stooping, lifting boxes, and carrying boxes 10 to 15 feet.[5]

Appellant submitted a November 18, 2015 report from Dr. Marc M. Levison, Board-certified in physical medicine and rehabilitation, who indicated that appellant presented with the primary complaint of pain in the left lateral and left posterior areas of her left knee.[6] Dr. Levison noted that physical examination of the left knee revealed swelling, medial joint tenderness, and a positive McMurray test. He diagnosed internal derangement of the left knee and referred appellant for evaluation by an orthopedic specialist. In an attending physician's report (Form CA-20), Dr. Levison listed the date of injury as April 14, 2015 and diagnosed internal derangement of the left knee due to the employment activity.

The findings of a November 9, 2015 magnetic resonance imaging (MRI) scan of appellant's left knee contained an impression of "high probability of tear of the posterior horn of the medial meniscus."

In a January 15, 2016 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. On January 15, 2016 it also

[3] A position description of the management/program assistant position indicates that it required intermittent standing, walking, bending/stooping, twisting, simple grasping, pushing/pulling/lifting, and reaching above the shoulder.

[4] In 2005 appellant suffered a nonwork-related anterior cruciate ligament tear of her left knee which improved without surgical intervention.

[5] Appellant indicated that she had some right knee pain, but she did not associate a specific right knee condition with employment factors.

[6] In a March 31, 2015 report, Dr. Levison noted that appellant complained of pain and swelling in both knees. Appellant submitted additional reports of Dr. Levison which showed that, by late-2015, she was primarily complaining of symptoms in her left knee.

requested additional evidence from the employing establishment. OWCP afforded appellant 30 days to submit the requested information.

In a January 28, 2016 e-mail, appellant's immediate supervisor indicated that he did not dispute appellant's description of her job duties since June 2013 when he became her supervisor. He indicated that he did not have knowledge of her job duties prior to that time.

Appellant submitted additional medical evidence, including a December 29, 2015 report from Dr. Darren J. Friedman, a Board-certified orthopedic surgeon, who discussed his performance on that date of left knee surgery, including arthroscopic lysis of adhesions, partial medial meniscectomy, and chondroplasty/debridement of the patellofemoral compartment. The surgery was not authorized by OWCP. In a January 6, 2016 report, Dr. Freidman discussed the follow-up care appellant received after her December 29, 2015 surgery.

By decision dated February 26, 2016, OWCP accepted that appellant had established employment factors in the form of bending, stooping, twisting, and packing, lifting, and carrying boxes. However, it denied her claim, finding that she had not submitted sufficient medical evidence to establish a medical condition causally related to the accepted factors of her federal employment. OWCP concluded, therefore, that appellant had not met the requirements to establish "an injury and/or medical condition causally related to the accepted work event(s)."

On March 9, 2016 appellant, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a statement in which she provided additional details about her work activities and indicated that the pain in her left knee was constant. She also submitted physical therapy reports and additional medical reports from early-2016, including a February 12, 2016 addendum that Dr. Levison made to his November 18, 2015 report. Dr. Levison indicated that appellant reported that her job required her to constantly bend and handle heavy boxes over the past 13 years. Appellant advised that she had to pack boxes, lift boxes in and out of mails carts, and push mail carts filled with packed boxes. Dr. Levison noted that, in particular, appellant reported increased left knee discomfort due to shipping boxes between November 2014 and February 2015 and in September 2015. He advised that a November 9, 2015 MRI scan of appellant's left knee showed a tear of the posterior horn of the medial meniscus and indicated, "As there is no other history of injury or trauma to the left knee and the patient did not develop discomfort until she performed the activities mentioned above, the injury to the left knee is causally related to her duties as described."

Prior to a hearing being held, OWCP's hearing representative conducted a preliminary review and issued a September 20, 2016 decision which set aside the February 26, 2016 decision. She found that Dr. Levison's February 12, 2016 addendum report necessitated further development of the medical evidence and remanded the case to OWCP for referral of appellant for a second opinion examination and opinion regarding whether she sustained an employment-related knee condition.

On remand OWCP referred appellant and the case record to Dr. Mark Berman, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding whether she sustained an employment-related knee condition.

In an October 24, 2016 report, Dr. Berman reported his physical examination findings and noted that appellant complained of bilateral knee pain and that she had osteoarthritis in both knees. He indicated that she did not describe a twisting injury to either knee and he posited that her bilateral knee condition was not related to her employment activities. Dr. Berman advised that appellant could perform her date-of-injury job on a full-time basis.

By decision dated January 11, 2017, OWCP determined that appellant had not met her burden of proof to establish a knee injury causally related to the accepted factors of her federal employment. It found that the weight of the medical evidence with respect to this matter rested with the opinion of Dr. Berman.

On January 18, 2017 appellant, through counsel, requested a telephonic hearing with OWCP's hearing representative. During the hearing held on June 28, 2017, counsel argued that Dr. Berman's October 24, 2016 report did not contain adequate medical rationale in support of its conclusions.

By decision dated August 1, 2017, OWCP's hearing representative set aside the January 11, 2017 decision due to her determination that there was an unresolved conflict in the medical opinion evidence between Dr. Levison and Dr. Berman regarding whether appellant had an employment-related knee condition. She remanded the case to OWCP for referral of appellant and the case record to an impartial medical specialist for an examination and opinion on the matter.

On remand OWCP referred appellant and the case record, including an August 9, 2017 statement of accepted facts (SOAF), to Dr. Alan M. Crystal, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she sustained an employment-related knee condition.

In a September 13, 2017 report, Dr. Crystal discussed appellant's factual and medical history and reported his findings upon physical examination. He indicated that she exhibited normal range of motion of both knees and that there was no tenderness to palpation in either knee. Dr. Crystal opined that there was no explanation to link causation between appellant's diagnosed knee conditions (arthritis and torn meniscus) and her work duties. He indicated that she had a complex tear of the medial meniscus of the left knee and advised that a complex tear pattern (torn in multiple directions) of a meniscus occurred with long-term degeneration. Dr. Crystal posited that all the physical requirements listed in the SOAF would not have any twisting motion that could cause a torn meniscus. He noted that appellant also had left knee patella chondral degenerative changes and indicated that this was an area where arthritic articular surface degeneration could first occur. Dr. Crystal advised that, because the diagnostic testing did not show evidence of patellar tendinitis, the work duties described in the SOAF could not be causally linked to a knee pathology. He asserted that there were no objective findings of employment-related aggravation of preexisting knee arthritis or a "degenerating tearing meniscus." Dr. Crystal posited that degenerative arthritis had a direct relationship to obesity and noted that appellant had been treated for obesity, including treatment through gastric bypass surgery. He advised that obesity could not only be a causative factor in degenerative knee arthritis, but also "potentiates the arthritis once the degeneration has commenced." Dr. Crystal maintained that appellant could perform her date-of-injury job, noting that she had only minor patellar degeneration. In an attached September 28, 2017 work capacity evaluation form (Form OWCP-5c), he noted that appellant did not have work restrictions.

By decision dated November 9, 2017, OWCP determined that appellant had not met her burden of proof to establish a knee injury causally related to the accepted factors of her federal employment. It found that the special weight of the medical opinion evidence rested with the September 13, 2017 report of Dr. Crystal, the impartial medical specialist.

On November 17, 2017 appellant, through counsel, requested a telephonic hearing with OWCP's hearing representative. During the hearing held on April 13, 2018 counsel argued that Dr. Crystal's opinion was not well rationalized.

By decision dated June 20, 2018, OWCP's hearing representative set aside the November 9, 2017 decision due to her determination that Dr. Crystal did not provide adequate medical rationale in support of his opinion that appellant did not have an employment-related knee condition. She remanded the case to OWCP in order to request a supplemental report from Dr. Crystal which would provide further explanation regarding the question of whether appellant had an employment-related knee condition. OWCP provided Dr. Crystal with an updated SOAF, dated July 19, 2018, which provided additional details regarding appellant's work duties.

In an August 20, 2018 supplemental report, Dr. Crystal indicated that he had reviewed the July 19, 2018 SOAF and advised that it remained his opinion that appellant's knee conditions were not caused or contributed to by the accepted employment exposures. He indicated that the additional tasks described in the July 19, 2018 SOAF had not changed his previous opinion and noted that "a realistic traumatic mechanism causing significant knee arthritis is not caused by carrying 10 [to] 25 pounds, by repetitive bending, repetitive stooping, or any of the tasks listed in the revised SOAF." Dr. Crystal posited that a realistic causative factor for knee arthritis was obesity, which for appellant had been treated. He indicated that a realistic mechanism causing torn menisci was not carrying 10 [to] 25 pounds or any of the other tasks listed in the revised SOAF, but rather a realistic factor causing torn menisci was knee arthritis.

By decision dated September 12, 2018, OWCP determined that appellant had not met her burden of proof to establish a knee injury causally related to the accepted factors of her federal employment. It found that the special weight of the medical opinion evidence rested with the September 13, 2017 and August 20, 2018 reports of the Dr. Crystal.

On September 19, 2018 appellant, through counsel, requested a telephonic hearing with OWCP's hearing representative. During the hearing held on February 15, 2019, counsel argued that Dr. Crystal did not provide sufficient medical rationale for his opinion on causal relationship in his August 20, 2018 supplemental report.

By decision dated May 7, 2019, OWCP's hearing representative affirmed the September 12, 2018 decision, finding that the special weight of the medical opinion evidence rested with the reports of Dr. Crystal.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

[7] *Supra* note 2.

evidence, 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 disability or medical condition for which compensation is claimed is causally related to the employment injury.[8] These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[9]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.[12] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors.[13]

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."[14] 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.[15]

[8] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[9] *K.V. and M.E., id.; Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *Id.*; *Victor J. Woodhams*, *supra* note 10.

[14] 5 U.S.C. § 8123(a).

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

ANALYSIS

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

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Levison, an attending physician, and Dr. Berman, an OWCP referral physician, on the issue of whether appellant sustained a knee injury causally related to the accepted factors of her federal employment. In order to resolve the conflict, it properly referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Crystal for an impartial medical examination and an opinion on the matter.

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[16] If a given impartial medical specialist is unable to clarify or elaborate on his or her original report or if his or her supplemental report is also vague, speculative, or lacking in rationale, it must submit the case record and a detailed SOAF to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the issue.[17]

In a September 13, 2017 report, Dr. Crystal opined that there was no explanation to link causation between appellant's diagnosed knee conditions (arthritis and torn meniscus) and her work duties. He indicated that she had a complex tear of the medial meniscus of the left knee and advised that a complex tear pattern of a meniscus occurred with long-term degeneration. Dr. Crystal asserted that there were no objective findings of employment-related aggravation of preexisting knee arthritis or a "degenerating tearing meniscus." He posited that degenerative arthritis has a direct relationship to obesity and noted that appellant had been treated for obesity. Dr. Crystal further advised that obesity could not only be a causative factor in degenerative knee arthritis, but also "potentiates the arthritis once the degeneration has commenced." In an August 20, 2018 supplemental report, he indicated that he had reviewed an updated SOAF and advised that it remained his opinion that appellant's knee conditions were not caused or contributed to by the accepted employment exposures. Dr. Crystal indicated that the additional tasks described in the updated SOAF had not changed his previous opinion and noted that "a realistic traumatic mechanism causing significant knee arthritis is not caused by carrying 10 [to] 25 pounds, by repetitive bending, repetitive stooping, or any of the tasks listed in the revised SOAF."

In both his September 13, 2017 report and his August 20, 2018 supplemental report, Dr. Crystal provided an opinion that appellant's accepted work duties, including bending, stooping, lifting boxes, and carrying boxes, did not cause a knee condition or aggravate a preexisting knee condition. The Board notes that Dr. Crystal's opinion in this regard was essentially conclusory in nature and was not adequately supported by explanatory medical rationale. For this reason, the September 13, 2017 report of Dr. Crystal and his August 20, 2018 supplemental report did not sufficiently address the underlying issue of the present case. Therefore, in order to resolve the conflict in the medical opinion evidence, the case will be

[16] *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

[17] *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

remanded to OWCP for referral of the case record (including a SOAF) and appellant to a new impartial medical specialist for examination and an opinion which evaluates whether she sustained a knee condition causally related to the accepted factors of her federal employment.[18] After such further development as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 12, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

[18] *See supra* note 17.