United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 20-0692**
	)	**Issued: November 20, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Diamond Bar, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 10, 2020 appellant filed a timely appeal from an August 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 10, 2015, as she no longer had residuals or disability causally related to her accepted right knee sprain; and (2) whether appellant

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the August 16, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

has met her burden of proof to establish continuing residuals or disability causally related to her accepted right knee sprain on or after November 10, 2015.

FACTUAL HISTORY

On April 27, 2013 appellant, then a 55-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that on or before February 25, 2013 she sustained bilateral knee pain and swelling due to factors of her federal employment including standing, sitting, and getting in and out of her delivery vehicle. On the reverse side of the form, Supervisor C.H. controverted the claim, explaining that appellant had been off work for eight months since an April 10, 2012 cervical spine surgery, authorized under OWCP File No. xxxxxx469,[3] and had recently returned to work on a mounted delivery route with frequent absences for physical therapy.

In a February 25, 2013 statement, appellant noted the gradual onset of right knee swelling and immobility in late 2010, when she was working a collection and Express Mail route. She had been restricted to limited-duty due to the accepted neck and back conditions under OWCP File No. xxxxxx469.

In a February 25, 2013 duty status report (Form CA-17), Dr. Edward Mittleman, a Board-certified family practitioner, diagnosed bilateral knee derangement.[4]

In a development letter dated May 20, 2013, OWCP notified appellant of the factual and medical deficiencies of her claim. It advised her of the type of evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant provided an April 25, 2013 narrative report by Dr. Mittleman, noting that she had been off work for cervical discectomy and fusion from March 30, 2012 through January 6, 2013, when she returned to limited-duty work. He noted that she had left knee arthroscopy in 1985. On examination, Dr. Mittleman observed limited flexion in both knees. He obtained x-rays of both knees, which demonstrated degenerative joint disease. Dr. Mittleman diagnosed right knee degenerative joint disease, bilateral chondromalacia, bilateral medial meniscus degeneration, and left lateral meniscus degeneration. He attributed these degenerative changes to employment activities requiring repetitive impact loading, including prolonged

[3] Under OWCP File No. xxxxxx469, OWCP accepted that appellant sustained lumbar disc degeneration, displacement of a cervical disc without myelopathy, cervical disc degeneration, and brachial neuritis. Appellant's claims have not been administratively combined.

[4] A March 15, 2013 computerized tomography (CT) scan of the left knee demonstrated retropatellar and suprapatellar effusions, attenuation and thinning of the anterior horns of the medial and lateral meniscus indicating degenerative joint disease, and a curvilinear ossific density medial to the medial femoral condyle indicating mild Pellegrini-Stieda syndrome. A March 15, 2013 CT scan of the right knee demonstrated sclerosis of the medial plateau indicative of degenerative joint disease, minimal narrowing of the retropatellar joint space with effusion, narrowing and thinning of the anterior and posterior horns of the medical meniscus, and an almost bone-on-bone appearance of the anterior aspect of the medial tibiofemoral joint indicative of advanced degeneration of the anterior horn of the medial meniscus.

walking, and repetitive squatting. Dr. Mittleman noted work restrictions in periodic reports through April 10, 2014.

In a May 21, 2013 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, summarized appellant's history of injury and treatment, noting that she underwent left knee surgery in 1985. On examination, he observed bilateral knee effusion, positive right patellar ballottement test, and left patellofemoral crepitus. Dr. Herring diagnosed degenerative joint disease of both knees and bilateral medial meniscal tears. He opined that repetitive squatting, stooping, kneeling, and stair climbing caused "disruption in the [knees] and wearing away of the articular cartilage and the meniscus, which is evident by physical examination" and imaging studies. Dr. Herring prescribed physical therapy.

On July 26, 2013 OWCP accepted the claim for sprain of the right knee.

Appellant subsequently submitted an October 29, 2013 report from Dr. Herring, diagnosing degenerative joint disease of both knees and bilateral medial meniscal tears.

On April 24, 2014 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of the accepted right knee condition. Dr. Ma submitted a May 21, 2014 report in which he reviewed the SOAF and the medical record. On examination, he noticed a penny-sized reddened area on the front of both knees due to a May 17, 2014 fall. Dr. Ma diagnosed nonindustrial bilateral knee arthritis, nonindustrial osteopenia of both knees, status post nonindustrial left knee arthroscopy in January 1985, and a resolved right knee sprain. He opined that the diagnosed bilateral degenerative knee conditions were unrelated to factors of appellant's federal employment and that the accepted right knee sprain had resolved without residuals.

In a July 15, 2014 report, Dr. Herring opined that walking for prolonged periods during appellant's 32-year career as a letter carrier had caused degenerative changes to both knees.[5]

OWCP found a conflict of medical opinion between Drs. Herring and Mittleman, for appellant, and Dr. Ma, for the government, regarding the nature and extent of the employment-related knee condition. To resolve the conflict, it selected Dr. Leisure Yu, a Board-certified orthopedic surgeon, as an impartial medical examiner. OWCP provided him a SOAF, a copy of the medical record, and a list of questions. In a January 7, 2015 report, Dr. Yu reviewed the SOAF and medical record. He noted that the accepted injury occurred when appellant was performing her "usual and customary work," and that her knee pain began in January 2013 when she was "not actively working and when [appellant] was resting and recovering from" cervical spine surgery under OWCP File No. xxxxxx469. On examination, Dr. Yu observed mildly restricted range of motion of both knees. He diagnosed degenerative joint disease of both knees, bilateral medial meniscal degeneration, and left knee lateral meniscal degeneration. Dr. Yu opined that appellant's bilateral knee arthritis was either idiopathic in nature or related to the prior left knee injury, as she had no other history of trauma. He noted that the accepted work factors had not precipitated or aggravated her knee conditions, and that the accepted right knee sprain had ceased without

[5] Dr. Herring and Dr. Mittleman provided periodic chart notes through January 8, 2015 noting continued bilateral knee symptoms.

residuals or the need for additional treatment. Dr. Yu estimated that appellant would have attained maximum medical improvement on May 25, 2013, three months after the right knee sprain diagnosis.

In February 24 and March 12, 2015 reports, Dr. Basimah Khulusi, a Board-certified physiatrist, diagnosed an acute exacerbation of degenerative right knee osteoarthritis. She held appellant off work through May 15, 2015.

In a May 19, 2015 report, Dr. Herring noted a large effusion of the right knee with medial and lateral joint line tenderness. He diagnosed degenerative joint disease of the right knee, bilateral medial meniscal degeneration with medial meniscal tear, left lateral meniscal degeneration, status post left knee arthroscopy, and possible reflex sympathetic dystrophy syndrome. Dr. Herring prescribed a diagnostic stellate ganglion block and physical therapy.

In a June 15, 2015 report, Dr. Khulusi disagreed with Dr. Yu's opinion. She opined that climbing in and out of a delivery vehicle created torque forces on appellant's knees that caused repetitive joint trauma. Additionally, pushing and pulling heavy hampers, walking on uneven terrain, bending, and squatting created stress forces on both knees, contributing to cumulative joint trauma. Dr. Khulusi opined that the identified work factors caused acute exacerbation of degenerative joint disease of the right knee and accelerated degenerative joint disease and meniscal degeneration of both knees. She continued to hold appellant off work.[6]

By an August 5, 2015 notice, OWCP provided appellant with a proposed termination of her wage-loss compensation and medical benefits, because the medical evidence of record established that she no longer had any residuals or continuing disability from her accepted work injury. It determined that the special weight of the medical evidence rested with Dr. Yu. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

In response, appellant submitted a July 20, 2015 report by Dr. James A. Kim, a Board-certified anesthesiologist specializing in pain management, who administered a right knee injection and prescribed medication.

In an August 20, 2015 report, Dr. Khulusi contended that OWCP mischaracterized the accepted injury as a right knee sprain, whereas appellant had sustained an occupationally related-degenerative condition of the right knee joint and meniscus. She contended that Dr. Yu found no evidence of a right knee sprain as appellant had never had one. Dr. Khulusi opined that repetitive torque and loading forces on both lower extremities greatly accelerated progression of degenerative joint disease of both knees. She opined that these conditions totally disabled appellant from work commencing February 25, 2015.

By decision dated November 19, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective November 10, 2015. It found that the special weight

[6] Appellant participated in physical therapy treatments in July and August 2015.

of the medical evidence rested with Dr. Yu, OWCP's impartial medical examiner, who concluded in his January 7, 2015 report that the accepted right knee sprain had ceased without residuals.

On November 30, 2015 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the November 19, 2015 termination decision.

OWCP subsequently received November 10, 2015 and March 10, 2016 reports, wherein Dr. Khulusi noted appellant's symptoms of continued bilateral knee pain. On examination, Dr. Khulusi observed warmth in both knees with severe tenderness over the medial tibial plateau. She diagnosed an acute exacerbation of degenerative joint disease of the right knee, bilateral chondromalacia, bilateral medial meniscal degeneration, right medial meniscal tear, and rule out osteochondral injuries on the right. Dr. Khulusi opined that repetitive trauma during appellant's decades as a letter carrier greatly accelerated the osteoarthritic degenerative process in both knees beyond what would be expected for someone of appellant's age.

Dr. Hosea Brown III, a Board-certified internist, provided February 9 and May 10, 2016 reports, maintaining appellant on modified duty.

By decision dated August 15, 2016, an OWCP hearing representative affirmed the November 19, 2015 termination decision, based on Dr. Yu's opinion as the special weight of the medical evidence.

On January 17, 2017 appellant requested reconsideration. She submitted August 9, 2016 reports by Dr. Brown again maintaining appellant on limited duty.

In December 6, 2016 reports, Dr. Khulusi reiterated appellant's previous diagnoses. She noted that appellant wore bilateral knee braces and ambulated using a cane, walker, or scooter. In a report dated December 22, 2016, Dr. Khulusi contended that appellant's 1985 left knee surgery was unrelated to her current condition as she had been asymptomatic for 27 years before the current onset of symptoms.

By decision dated February 22, 2017, OWCP denied modification of the August 15, 2016 decision, finding that Dr. Yu's impartial medical opinion continued to represent the special weight of the medical evidence.

On February 21, 2018 appellant, through her then representative, requested reconsideration.

In a February 15, 2018 report, Dr. Khulusi noted that contrary to Dr. Yu's assertion that appellant's bilateral knee symptoms began while appellant was recuperating from cervical spine surgery from March 30, 2012 to January 6, 2013, she had been working for seven weeks before presenting for treatment of bilateral knee pain. She provided Form CA-17 reports through April 10, 2018, noting work restrictions reiterating prior diagnoses.

By decision dated May 22, 2018, OWCP denied modification of the February 22, 2017 decision, finding that Dr. Yu's opinion continued to represent the special weight of the medical evidence.

On May 20, 2019 appellant, through her then-representative, requested reconsideration of the May 22, 2018 decision. She contended that OWCP's referral physicians failed to properly review the medical record. Appellant provided reports from Dr. Khulusi dated from August 27, 2018 to February 27, 2019 noting work restrictions.

By decision dated August 16, 2019, OWCP denied modification of the May 22, 2018 decision, finding that Dr. Khulusi's additional reports did not address whether appellant had continuing residuals or disability due to her accepted condition.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[7] After it has been determined that, an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[8] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[10] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[11]

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."[12] 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.[13]

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[7] *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[8] *See R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[9] *See R.P., id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[10] *Z.D., supra* note 7; *see R.P., id.*; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[11] *See R.P., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id*.

[12] 5 U.S.C. § 8123(a).

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

The Federal (FECA) Procedure Manual provides that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim, as set forth in the SOAF.[14] When OWCP's referral physician or impartial medical specialist does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.[15]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 10, 2015.

OWCP properly declared a conflict in medical opinion evidence between Drs. Herring and Mittleman, for appellant, and Dr. Ma, for the government, and referred appellant, the SOAF, a list of questions, and the medical evidence of record to Dr. Yu, for an impartial medical evaluation, pursuant to 5 U.S.C. § 8123(a).

Dr. Yu, however, provided a conflicting history of injury in his January 7, 2015 report. He indicated both that the accepted right knee sprain occurred while appellant was in the performance of her customary duties and that her symptoms had begun while she was off from work recuperating from cervical spine surgery prior to January 2013. This discrepancy casts doubt on Dr. Yu's understanding of the facts of appellant's claim.[16] Furthermore, he opined that her bilateral knee arthritis was either idiopathic in nature or related to the prior left knee injury, as she had no other history of trauma. Dr. Yu noted that the accepted work factors had not precipitated or aggravated her knee conditions, and that the accepted right knee sprain had ceased without residuals or the need for additional treatment. Given his failure to acknowledge the accepted employment condition, Dr. Yu's opinion is, therefore, of diminished probative value regarding OWCP's termination of her wage-loss compensation and medical benefits.[17]

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 10, 2015, as the medical evidence of record is insufficient to establish that she no longer had residuals or disability causally related to her accepted right knee sprain.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 10, 2015.[18]

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[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.810.11a (September 2019).

[15] *Id*. at Chapter 3.600.3(10) (October 1990).

[16] *A.C., id., S.R.*, Docket No. 19-1229 (issued May 15, 2020).

[17] *Supra* notes 15 and 16; *see also P.E.*, Docket No. 19-0837 (issued October 20, 2020).

[18] In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 20, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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