United States Department of Labor
Employees' Compensation Appeals Board

C.E., Appellant	)	
and	)	**Docket No. 19-1923**
	)	**Issued: March 30, 2021**
U.S. POSTAL SERVICE, SOUTH JERSEY POSTAL & DISTRIBUTION CENTER, Bellmawr, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 17, 2019 appellant, through counsel, filed a timely appeal from an April 11, 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 that the acceptance of her claim should be expanded to include diagnosed right knee conditions as a consequence of her accepted June 1, 1992 employment injury.

FACTUAL HISTORY

On June 1, 1992 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she fell on a cement walkway while in the performance of duty. She stopped work that day. OWCP ultimately accepted the claim for left medial meniscus tear and left knee osteoarthritis. Appellant underwent OWCP-authorized left knee arthroscopic surgery in 1993. She returned to work on June 15, 1994 in a modified-duty capacity. OWCP accepted that appellant sustained recurrences of disability on March 27, 2008 and August 28, 2010.

On December 17, 2010 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work, as of November 6, 2010, alleging that she had been overusing her right knee due to her left knee injury. By decision dated February 10, 2011, OWCP denied the recurrence claim as there was no rationalized medical evidence supporting a worsening of her condition such that she was unable to work her limited-duty assignment.

In an August 5, 2011 report, Dr. Laura E. Ross, a Board-certified orthopedic surgeon, indicated that appellant's right knee had become swollen and painful after she was offered an assignment on August 27, 2010 that was not within her work restrictions. She provided an impression of medial meniscus tear with underlying mild arthritis of the right knee, which she opined was caused or aggravated by employment. Dr. Ross explained that prolonged standing placed a strain on appellant's left knee, which in turn caused her knee to buckle which caused more stress on the right knee.

In a June 1, 2012 report, Dr. Stanley Askin, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant had bilateral osteoarthritis of her knees, which had not directly resulted from the June 1, 1992 employment injury, but rather was due to her significant weight.

On March 18, 2014 OWCP determined that a conflict in medical opinion existed between Dr. Ross and Dr. Askin, as to whether appellant had continuing disability due to the accepted June 1, 1992 employment injury.

OWCP referred appellant, along with the medical record and a statement of accepted facts (SOAF), to Dr. Eric B. Lebby, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion. In an April 22, 2014 report, Dr. Lebby noted the history of injury, his review of the medical records, and examination findings. He opined

that appellant's current right knee condition was not causally related to the June 1, 1992 employment injury, but was the result of degenerative changes.

Appellant filed a separate occupational disease claim (Form CA-2) for a right knee condition arising as of December 4, 2010. Under OWCP File No. xxxxxx669, OWCP, in an August 5, 2015 decision, denied her claim.

Appellant underwent additional OWCP-authorized left knee meniscectomy and chondroplasty for tear of the left knee medial meniscus on April 20, 2016. Effective May 29, 2016, OWCP paid her compensation on the periodic compensation rolls.

In a subsequent August 19, 2016 report, Dr. Askin rendered a second opinion that appellant's left knee meniscus condition had resolved and there was no need to expand the claim to include other medical conditions. He noted that her bilateral knee condition was degenerative in nature, seemingly secondary to her being significantly heavier than ideal. Dr. Askin opined that appellant's employment would not have directly caused, precipitated, or aggravated her osteoarthritic medical conditions. He opined that her temporary period of incapacity had resolved and that her obesity was the cause of her impairment. Appellant subsequently returned to work as a modified clerk, effective April 3, 2017.

On May 8, 2017 Dr. Ross requested that appellant's claim be expanded to include additional diagnoses of right knee internal derangement, chondromalacia patella, exacerbation of underlying arthritis, and medial meniscus tear. She opined that the left knee injury caused appellant to overuse the right knee and that the resulting pressure on the right knee caused the medial meniscus tear and exacerbated right knee osteoarthritis.

In February 3, May 16, and August 30, 2017 letters, counsel requested that the acceptance of the claim be expanded to include a diagnosed right knee meniscus tear and aggravation of right knee arthritis.

By decision dated November 3, 2017, OWCP denied expansion of the claim for right knee conditions. It found that the medical evidence of record did not establish causal relationship between appellant's right knee conditions and the accepted June 1, 1992 employment injury.

On November 13, 2017 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's November 3, 2017 decision. A hearing was held on April 30, 2018.

In a June 21, 2018 report, Dr. Ross reiterated her opinion that appellant's left knee injury caused her to overuse the right knee and that the resulting pressure on the right knee caused the medial meniscus tear and exacerbated right knee osteoarthritis.

By decision dated July 13, 2018, an OWCP hearing representative set aside the November 3, 2017 decision. She found that Dr. Lebby's 2014 impartial medical opinion was not

sufficiently rationalized to be dispositive regarding causal relationship. The hearing representative remanded the case for further development and issuance of a *de novo* decision.

On remand OWCP referred appellant to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion between Drs. Askin and Ross regarding whether appellant's right lower extremity conditions were consequential to the accepted June 1, 1992 employment injury. OWCP provided a July 17, 2018 SOAF, which did not note the accepted conditions, and a July 17, 2017 list of questions, which indicated that appellant's accepted conditions were left knee meniscal tear and left knee osteoarthritis. An ME023 form dated July 25, 2018 documented the selection of Dr. Fries. The ME023 showed that 21 physicians were bypassed prior to the selection of Dr. Fries. The two physicians within the initial search zip cluster were bypassed for reason O - other, noting the listed number was wrong and was a fax number, and reason S - subspecialty noting that the physician only treated neck and back conditions. No physicians were found in a 50-mile range outside of search zip cluster. The 19 physicians within the 75-mile range outside of search zip cluster were bypassed for reasons S – subspecialty; O – other, no longer with the facility; D – physician did not accept Department of Labor (DOL) patients; and B – physician too busy for examination.

In an October 16, 2018 report, Dr. Fries noted his review of appellant's medical records. He indicated that appellant confirmed her right knee first became symptomatic in approximately 2011 and he discussed her examination findings, noting that she only had mild bilateral knee complaints consistent with age-related degenerative disease aggravated by obesity. Dr. Fries diagnosed bilateral knee osteoarthritis, post 1992 and 2016 left knee arthroscopic operations; chronic right lateral ankle pain, and mild chronic cervical and low back symptoms, none of which are medically connected to appellant's employment-related injury 26 years ago.[3] He noted that a SOAF which confirmed the diagnoses accepted by OWCP had not been provided. Dr. Fries indicated that he reviewed OWCP's decisions of "November 3, 2017, April 11, 2018 and April 30, 2018"[4] And that his "evaluation and opinion are based upon left knee medial meniscal tear and osteoarthritis as the only conditions currently accepted" by OWCP. He also noted that he had not been provided the first 16 years of medical records subsequent to appellant's accepted 1992 left knee injury and he specifically noted that radiologic reports of at least one right knee magnetic resonance imaging (MRI) scan and one left knee MRI scan were not available. Thus, Dr. Fries concluded it was "speculative" how much of appellant's current left knee condition remained 26 years after trauma. He noted that appellant's current bilateral knee presentations were consistent with age-related osteoarthritis, a progressively worsening condition with variable course. Dr. Fries indicated that there was no swelling, synovitis, effusion, increased temperature or loss of motion in either knee. He indicated that there was no scientific support for Dr. Ross' theory that appellant's left knee condition caused overuse of the right knee and therefore causal relationship existed to the left knee injury which had occurred 26 years ago. Dr. Fries indicated that appellant did not have measurable injury-related disability, noting that her mild bilateral knee complaints were consistent with age-related degenerative joint disease, which are likely aggravated by obesity. He explained that appellant's right knee conditions were not causally related to the June 1, 1992

[3] Dr. Fries indicated that other diagnoses of record were noted to include obesity, diabetes mellitus, anxiety, depression and bipolar disorder.

[4] There is no OWCP decision dated April 30, 2018.

employment incident and therefore no medical treatment was required. Dr. Fries explained that regardless of the condition of one lower extremity, it was impossible to place more than body weight on the opposite extremity. He reasoned that, if anything, injury on one side decreased activities and therefore lessened stress on the opposite extremity.

By decision dated November 6, 2018, OWCP denied expansion of the acceptance of appellant's claim to include right knee meniscus tear and aggravation of right knee arthritis as employment-related conditions. It found that the opinion of Dr. Fries, as the impartial medical examiner (IME), constituted the special weight of the evidence and established that she had not sustained right lower extremity conditions as a consequential injury.

On November 15, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held by video on March 4, 2019. Counsel argued that based on information and belief several of the physicians listed in the ME023 were incorrectly bypassed. He suggested that physicians that were bypassed in this case were selected in other nonrelated claims handled by his office. Counsel proposed submitting documentation from these other claims to support his contention. Citing to FECA Circular No. 13-07 (issued September 6, 2013), the hearing representative indicated that such submissions would be improper and referenced a March 4, 2019 letter to counsel.[5] Counsel further argued that Dr. Fries' opinion was speculative and that he was not provided with a SOAF.

By decision dated April 11, 2019, an OWCP hearing representative affirmed the November 6, 2018 decision.

LEGAL PRECEDENT

The claimant bears the burden of proof to establish a claim for a consequential injury.[6] As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[7]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[8] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was

[5] In a March 4, 2019 letter to counsel, the hearing representative indicated that FECA Circular No. 13-07 (issued September 6, 2013), prohibits submission of documents from one claim file to the file of another injured worker. The hearing representative concluded that counsel may not submit any documents from the claim files of other individuals.

[6] *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

[7] *K.W.*, Docket No. 18-0991 (issued December 11, 2018).

[8] *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[9]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[10]

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.[11] 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.[12] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual and medical background, must be given special weight.[13]

The medical management application (MMA) system provides for a rotation among potential impartial medical specialists from the American Board of Medical Specialties, including the medical boards of the American Medical Association, and those physicians Board-certified with the American Osteopathic Association.[14] Upon proper entry of appointment information, the MMA system prompts the medical scheduler to prepare a Form ME023 (appointment notification report) for imaging into the case file.[15]

The MMA contains an automatic and strict rotational scheduling feature. This application provides for consistent rotation among physicians and records the information needed to document

[9] *Id.*

[10] *See V.K.*, Docket No. 19-0422 (issued June 10, 2020); *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

[13] *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(a) (May 2013).

[15] *Id*. at Chapter 3.500.5(h), (i). The ME023 serves as documentary evidence that the referee appointment was scheduled through the MMA rotational system. *Id.*

the selection of the physician.[16] The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting physicians (in the designated specialty in the appropriate geographic area) in alphabetical order as listed in the roster and repeating the process until the list is exhausted.[17] Selection of a referee physician should be made only through the MMA (absent exceptional circumstances) and OWCP may not dictate which physician will serve as a referee examiner. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed by the selected physician carries the special weight accorded to an impartial medical specialist.[18]

ANALYSIS

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

OWCP initially determined that a conflict in medical opinion evidence arose between Dr. Ross and Dr. Askin as to whether appellant had continuing disability due to the accepted June 1, 1992 employment injury. It referred appellant to Dr. Lebby, who opined in his April 22, 2014 report that appellant's bilateral knee pain was due to degenerative changes and not a result of the June 1, 1992 employment injury. An OWCP hearing representative found that Dr. Lebby did not provide a specific opinion of causal relationship of the right knee condition and the 1992 injury either by direct or indirect cause. To be entitled to special weight, Dr. Lebby's opinion must contain clear, persuasive rationale on the critical issue in the claim.[19] As Dr. Lebby's report did not contain such rationale, OWCP's hearing representative properly found that Dr. Lebby's April 22, 2014 opinion was insufficiently rationalized to be dispositive as to the cause of appellant's right knee conditions. Thus, as a conflict in medical opinion continued to exist, OWCP properly referred appellant, in July 2018, to Dr. Fries for a second impartial medical examination.

On appeal and before OWCP, counsel argued that Dr. Fries was improperly selected under the MMA. He indicated that he attempted to provide evidence at the hearing that physicians were improperly bypassed. Counsel proposed to submit documentation to substantiate his contention that demonstrated that some physicians were accepting DOL patients during the same time period in question. Following the hearing, he noted that he was informed by the hearing representative that the submission of evidence from other files was not permissible under FECA Circular No. 13-07 (issued September 6, 2013). Counsel thus contended that appellant was deprived of her due process as OWCP's hearing representative willfully ignored the evidence and used FECA Circular No. 13-07 as a shield.

The Board finds that Dr. Fries was properly selected to perform the impartial medical examination as the record supports that OWCP followed its established procedures in his selection.

[16] *Id.* at 3.500.5 (May 2013).

[17] *Id.* at 3.500.4(b)(6) (July 2011).

[18] *Id.* at 3.500.5(b) (May 2013).

[19] *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

The record contains a Form ME023 documenting the selection of Dr. Fries and a log of bypassed physicians, including bypass codes and explanations of why each physician was bypassed, and a certification that the MMA had been used to select the IME. The logs indicated that OWCP bypassed 21 physicians prior to selecting Dr. Fries either because the physician either had a wrong number listed, had subspecialties other than the knee, was no longer with the facility, did not accept DOL patients, or was too busy to conduct the examination. The Board finds that OWCP provided adequate documentation to establish that it properly utilized its MMA system in selecting Dr. Fries.[20] As OWCP properly followed its procedures in selecting Dr. Fries as the IME, the hearing representative properly excluded documentary evidence from other files under FECA Circular No. 13-07.

While Dr. Fries was properly selected as the IME, the Board finds that Dr. Fries' opinion cannot be accorded the special weight of the IME. Counsel initially argues that Dr. Fries was not provided a SOAF to review. The record reflects that Dr. Fries was provided a July 17, 2018 SOAF, but the SOAF did not list the conditions accepted. In his report, Dr. Fries noted that the July 17, 2018 SOAF did not indicate the diagnoses that were accepted by OWCP. Based on his review of the record,[21] he concluded that the only conditions currently accepted by OWCP were left knee medial meniscal tear and osteoarthritis. While Dr. Fries did properly identify the accepted conditions, it is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.[22] OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[23] As Dr. Fries did not have a complete and accurate SOAF as the framework in forming his opinion, his opinion is of diminished probative value and is not entitled to the special weight typically afforded to an IME.[24]

Furthermore, Dr. Fries specifically indicated that he had not been provided with the first 16 years of medical records subsequent to appellant's accepted 1992 left knee injury and he specifically noted that radiologic reports of at least one right knee MRI scan and one left knee MRI were not available. Dr. Fries explained that he therefore had to speculate as to how much of her current left knee condition remained 26 years after the trauma. As Dr. Fries was not provided the medical records necessary to properly assess appellant's medical history, his report was not based

[20] *W.B.*, Docket No. 17-1698 (issued May 16, 2018); *S.L.*, Docket No. 14-1250 (issued December 2, 2015); *B.H.*, Docket No. 14-0423 (issued June 26, 2014).

[21] *See supra* note 4.

[22] *B.K.*, Docket No. 19-0976 (issued December 15, 2020); *M.B.*, Docket No. 19-0525 (issued March 20, 2020); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[23] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also C.C.*, Docket No. 19-1948 (issued January 8, 2021); *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

[24] *See C.C., id.*; *S.T.*, Docket No. 18-1144 (issued August 9, 2019) (medical opinions based on an incomplete or inaccurate history are of limited probative value).

on a proper factual and medical background and cannot be considered sufficiently well rationalized.[25]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.[26] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[27] Accordingly, the Board finds that the case must be remanded to OWCP.[28]

On remand OWCP shall clarify the accepted conditions and prepare an updated SOAF. It shall then refer the case record, together with the SOAF, to Dr. Fries for a reasoned opinion regarding whether appellant had continuing disability due to the accepted June 1, 1992 employment injury and the cause of appellant's right knee conditions.[29] If Dr. Fries is unable to clarify or elaborate on his original report, or if his supplemental report is vague, speculative, or lacking in rationale, OWCP shall refer appellant to a new IME.[30] Following this and any such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[25] *See L.F.*, Docket No. 20-0459 (issued January 27, 2021); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[26] *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

[27] *Id.*; *see also R.M.*, Docket No. 16-0147 (issued June 17, 2016).

[28] *See L.F., supra* note 25; *J.T.*, Docket No. 18-1300 (issued March 22, 2019).

[29] *See L.F., supra* note 25; *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

[30] *See M.S.*, Docket No. 18-1228 (issued March 8, 2019); *R.H.*, Docket No. 17-1903 (issued July 5, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 30, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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