United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 20-1396**
	)	**Issued: November 22, 2021**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kansas City, MO, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 20, 2020 appellant, through counsel, filed a timely appeal from a January 23, 2020 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] The Board notes that following the January 23, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's medical benefits, except for those related to her left knee medial meniscus tear, effective December 17, 2015; (2) whether appellant has met his burden of proof to establish continuing residuals on or after December 17, 2015.

FACTUAL HISTORY

On February 23, 2012 appellant, then a 51-year old clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 19, 2012 she sustained injury to her hand, knees, ankles, and body when she caught her foot on a mail tray and fell to the floor while in the performance of duty. She did not stop work, but she began working in a limited-duty position without wage loss on February 20, 2012. OWCP initially accepted appellant's claim for sprains of the knees and ankles.[4]

On December 17, 2012 OWCP expanded appellant's accepted conditions to include a neck sprain, sprains of the heels, and aggravation of L4-5 disc protrusion, and aggravation of L4-5 and L5-S1 annular tears. On February 1, 2013 it expanded her accepted conditions to include aggravation of L5-S1 disc protrusion and bilateral wrist sprains. On June 5, 2013 OWCP expanded her accepted conditions to further include medial meniscus tear of the left knee. On July 16, 2013 Dr. Prem Parmar, a Board-certified orthopedic surgeon, performed OWCP-authorized left knee surgery, including arthroscopy with debridement of patellar chondromalacia and plice excision.[5] In September 2013, Dr. Parmar recommended that appellant undergo arthroscopic surgery on her right knee, which he believed was necessitated by residuals of her accepted employment injury.

On October 11, 2013 OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions to Dr. Edward J. Prostic, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that Dr. Prostic indicate whether appellant had continuing employment-related residuals and whether right knee surgery was necessitated by the February 19, 2012 employment injury.

In a November 4, 2013 report, Dr. Prostic discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that appellant complained of pain in her neck, back, and all extremities, and that she exhibited limited cervical motion and abnormal quadriceps angles of the knee, greater on the right than on the left. Dr. Prostic advised that he doubted that right knee surgery "would be helpful at this time" and noted that "the current difficulties in the right knee are very likely the same as in the previous 'right knee sprain.'"

In a November 6, 2013 report, Dr. Parmar indicated that appellant continued to have left knee symptoms after her July 16, 2013 surgery, and that she had some chondromalacia of her right

[4] Under a separate prior claim, assigned OWCP File No. xxxxxx289, OWCP accepted that on July 3, 2003 appellant sustained a bulging disc at L5-S1. Under another separate prior claim, assigned OWCP File No. xxxxxx344, OWCP accepted that on August 10, 2005 appellant sustained a left ankle sprain, and sprain/strains of the right shoulder/arm, right knee/leg, and of the thoracic and lumbar regions. OWCP administratively combined the files for OWCP File Nos. xxxxxx289, xxxxxx344, and xxxxxx300, designating the latter as the master file.

[5] Appellant stopped work for the period July 15 through 29, 2013 and OWCP paid wage-loss compensation for disability from work on the supplemental rolls for this period.

knee due to the February 19, 2012 fall at work. He also advised that appellant continued with "issues with her wrists and ankles," which were related to the February 19, 2012 employment injury.

OWCP requested a supplemental report from Dr. Prostic to clarify his opinion on the issue of appellant's employment-related residuals. In a November 8, 2013 report, Dr. Prostic noted, "I have no objective evidence to indicate that the left ankle sprain, right ankle sprain, left heel sprain, right heel sprain, right wrist sprain, left wrist sprain, cervical spine sprain, or lumbar spine aggravation of L4-5 and L5-S1 disc protrusion and annular tears is [sic] still active."

On January 8, 2014 OWCP determined that there was a conflict in the medical opinion evidence regarding whether appellant had residuals of her accepted employment injuries, other than her left knee employment injury/conditions, which was determined to have not resolved. In order to resolve the conflict, it referred appellant, along with a SOAF and series of questions to Dr. David J. Clymer, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation. OWCP requested that Dr. Clymer evaluate whether appellant required right knee surgery due to employment-related residuals and whether her various other accepted employment conditions, other than those relating to the left knee, had resolved.

In a February 25, 2014 report, Dr. Clymer discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that appellant had a primary complaint of right knee pain, but also had moderate generalized areas of discomfort in the back and upper extremities, as well as mild generalized irritability in her right ankle and hind foot. Appellant exhibited mild patellar crepitus in both knees. Dr. Clymer discussed the diagnostic testing for appellant's right knee and opined that appellant had minor patellofemoral chondromalacia, which the February 19, 2012 fall at work might have aggravated. He indicated that there was no significant localized cartilage instability, ligament injury, or meniscus tear in the right knee and opined that, therefore, the likelihood of significant symptomatic improvement with right knee arthroscopy was "rather low." Dr. Clymer recommended continued conservative non-surgical treatment for the right knee. He noted that, with regard to the multiple other areas of sprains and strains involving the ankles, heels, wrists, neck, and lumbar spine, "I see nothing today on my objective clinical exam[ination] nor in the history and review of records which would suggest there is a significant ongoing problem in these areas which would require further treatment." Dr. Clymer further indicated, "I believe the sprains and strains in general have resolved." He opined that appellant could work a job that involved moderate sedentary duties and moderate standing and walking.

In a notice dated May 20, 2014, OWCP advised appellant that it proposed to terminate her medical benefits, except for those related to her left knee. It informed her that the proposed termination action was justified by the well-rationalized February 25, 2014 report of Dr. Clymer, the impartial medical specialist. OWCP advised appellant that this report carried special weight with respect to employment-related residuals and afforded her 30 days to submit evidence challenging the proposed termination action.

Appellant submitted additional medical evidence, including reports of Dr. Parmar from May and June 2014.

By decision dated July 3, 2014, OWCP terminated her medical benefits except for those related to her left knee medial meniscus tear, effective July 3, 2014.

On July 22, 2014 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings of Review. A telephonic hearing was held on February 9, 2015. By decision dated April 29, 2015, OWCP's hearing representative reversed the July 3, 2014 decision, finding that Dr. Clymer's February 25, 2014 report did not contain sufficient medical rationale to resolve the conflict in the medical opinion evidence regarding employment-related residuals. The representative remanded the case to OWCP and directed that appellant be referred back to Dr. Clymer for additional evaluation regarding the extent of appellant's employment-related residuals, to be followed by the issuance of a *de novo* decision.

On remand OWCP referred appellant to Dr. Clymer for examination and evaluation, and requested a supplemental medical report regarding whether appellant continues to possess one or more of the accepted employment conditions. In an August 3, 2015 report, Dr. Clymer reported the findings of his August 3, 2015 examination of appellant. He indicated that appellant reported chronic neck discomfort and stiffness, chronic midback discomfort, chronic low back discomfort, chronic bilateral hand pain/numbness/weakness, chronic bilateral knee pain, and chronic bilateral ankle and heel discomfort. Dr. Clymer noted that, during the examination, appellant exhibited subjective discomfort upon palpation in these regions. He provided a discussion of appellant's diagnostic testing, noting that it showed some degenerative processes in the neck, wrists, knees, ankles, and low back. Dr. Clymer advised that the opinions he expressed in his February 25, 2014 report remained unchanged. He noted, "[w]hile I feel [appellant] may well have sustained various areas of sprain and strain as a result of the work-related fall on February 19, 2012, the objective clinical examination and multiple objective radiographic studies have not revealed evidence of any significant structural injuries which I feel would be clearly benefited by further surgical intervention." Dr. Clymer indicated that appellant's subjective symptoms were certainly significant and diffuse, involving multiple areas, but noted that it was unlikely that any aggressive or surgical measures would be of any clear benefit. He posited that surgical intervention at appellant's neck, wrists, knees, ankles, and back might even worsen her conditions in those regions. Dr. Clymer indicated that appellant might have significant ongoing subjective complaints, which would significantly limit the subjective sense of her ability to continue functioning at work. He advised that a more conservative approach with encouragement, activity, and moderate use of medications afforded the best opportunity to allow appellant to continue functioning and working in a safe and comfortable fashion.

By decision dated December 17, 2015, OWCP terminated appellant's medical benefits, except for those related to her left knee medial meniscus tear, effective that same date, based on the February 25, 2014 report of Dr. Clymer as clarified by his August 3, 2015 supplemental report.

On December 30, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings of Review. A telephonic hearing was held on August 1, 2016. By decision dated September 14, 2016, OWCP's hearing representative affirmed the December 17, 2015 decision.

On March 6, 2017 appellant requested reconsideration of the September 14, 2016 decision. She submitted a December 7, 2016 report from Dr. Parmar who reported physical examination findings and indicated, "[i]t is my impression and still has been since I first saw her that she has this work-related accident of February 2012. Appellant sustained injuries to both her wrists, knees, and ankles." In a February 7, 2017 report, Dr. Regina M. Nouhan, an osteopath and Board-certified surgeon, indicated that appellant had a cervical disc condition and bilateral carpal tunnel syndrome as a direct result of her work duties. In a February 16, 2017 report, Dr. Kathryn

Cameron, an osteopath and Board-certified family practitioner, opined that appellant had a bulging disc at C4-5 and herniated disc at C5-6, which constituted unresolved conditions related to the February 19, 2012 employment injury.

By decision dated November 14, 2017, OWCP denied modification of the September 14, 2016 decision.

On November 13, 2018 appellant requested reconsideration of the November 14, 2017 decision. She submitted January 17 and October 25, 2018 reports from Dr. Parmar who maintained that appellant had a chondral injury to her right knee and bilateral ankle sprains, with likely synovitis, which were due to her February 19, 2012 employment injury. In a June 26, 2018 report, Dr. Nouhan opined that the diagnosed conditions of bilateral carpal tunnel syndrome, left ulnar nerve syndrome, and right wrist tendinitis were caused by the February 19, 2012 fall at work.

By decision dated January 3, 2019, OWCP denied modification of the November 14, 2017 decision.

On December 28, 2019 appellant requested reconsideration of the January 3, 2019 decision. She submitted an October 9, 2019 report from Dr. Parmar who opined that she continued to have bilateral knee and ankle conditions related to the February 19, 2012 employment injury. In October 18 and 21, 2019 reports, Dr. Cameron maintained that appellant had disc protrusions and annular tears at L4-5 and L5-S1, which were related to the February 19, 2012 employment injury.[6]

By decision dated January 23, 2020, OWCP denied modification of the January 3, 2019 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[8] 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.[9] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[10]

[6] Appellant also submitted an October 1, 2019 report from Dr. Nouhan, which was similar to a previously submitted February 7, 2017 report.

[7] *L.L.,* Docket No. 18-1426 (issued April 5, 2019); *C.C.,* Docket No. 17-1158 (issued November 20, 2018); *I.J.,* 59 ECAB 408 (2008); *Vivien L. Minor,* 37 ECAB 541 (1986).

[8] *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[9] *See A.G.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[10] *See R.P.,* Docket No. 17-1133 (issued January 18, 2018).

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[11] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[12] In situations where the case is properly 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]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits, except for those related to her left knee meniscus tear, effective December 17, 2015.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Parmer, appellant's attending physician, and OWCP's referral physician, Dr. Prostic, on the issue of whether appellant continued to have residuals of his accepted conditions, which necessitated medical treatment. In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Clymer for an impartial medical examination and an opinion on the matter.[14]

In a February 24, 2014 report, Dr. Clymer discussed the diagnostic testing for appellant's right knee and opined that appellant had minor patellofemoral chondromalacia, which the February 19, 2012 fall at work might have aggravated. He indicated that there was no significant localized cartilage instability, ligament injury, or meniscus tear in the right knee and opined that, therefore, the likelihood of significant symptomatic improvement with right knee arthroscopy was "rather low." Dr. Clymer recommended continued conservative nonsurgical treatment for the right knee. He noted that, with regard to the multiple other areas of sprains and strains involving the ankles, heels, wrists, neck, and lumbar spine, "I see nothing today on my objective clinical exam[ination] nor in the history and review of records which would suggest there is a significant ongoing problem in these areas which would require further treatment." Dr. Clymer further indicated, "I believe the sprains and strains in general have resolved."

The Board finds that Dr. Clymer's February 25, 2014 report is not sufficiently well rationalized to carry special weight and to justify OWCP's termination of appellant's medical benefits, except for those related to her left knee meniscus tear.[15] Dr. Clymer provided only a

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[11] 5 U.S.C. § 8123(a); *see E.L.,* Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[12] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

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

[14] 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." 5 U.S.C. § 8123(a).

[15] *See supra* note 12.

cursory and minimal discussion of the multiple medical conditions accepted as caused by the February 19, 2012 employment injury. With respect to the resolution of these conditions, he simply noted, without elaboration, that he believed "the sprains and strains in general have resolved." The conditions accepted by OWCP included a neck sprain, bilateral sprains of the wrists, knees, ankles, and heels, and aggravation of L4-5 disc protrusion and L4-5, and aggravation of L5-S1 annular tears. Dr. Clymer did not provide any discussion of how and when each of these conditions resolved. The fact that he failed to provide adequate medical rationale in support of his opinion renders it of limited probative value on the issue of continuing employment-related residuals and the need for medical treatment.[16]

In an August 3, 2015 supplemental report, Dr. Clymer advised that the opinions he expressed in his February 25, 2014 report remained unchanged. He noted, "[w]hile I feel [appellant] may well have sustained various areas of sprain and strain as a result of the work-related fall on February 19, 2012, the objective clinical examination and multiple objective radiographic studies have not revealed evidence of any significant structural injuries which I feel would be clearly benefited by further surgical intervention." Dr. Clymer indicated that appellant's subjective symptoms were certainly significant and diffuse, involving multiple areas, but noted that it was unlikely that any aggressive or surgical measures would be of any clear benefit.

The Board notes that Dr. Clymer's August 3, 2015 supplemental report is of limited probative value on the underlying issue of the case because it does not provide any further discussion, fortified with medical rationale, to explain how and when appellant's multiple accepted medical conditions had resolved such that he would not require medical benefits to treat those conditions. In fact, Dr. Clymer acknowledged that appellant had a number of symptoms in each of the bodily regions where OWCP accepted employment-related conditions. He emphasized that surgical intervention was not recommended, but he did not adequately explain why appellant would not continue to have employment-related residuals, which would necessitate some form of medical treatment.

Because there remains an unresolved conflict in the medical opinion evidence regarding employment-related residuals and the need for medical treatment of continuing employment-related conditions, the Board finds that OWCP failed to meet its burden of proof.[17]

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits, except for those related to her left knee meniscus tear, effective December 17, 2015.[18]

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[16] *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017). *See also supra* note 9.

[17] *See L.H.,* Docket No. 17-1859 (issued May 10, 2018); *R.R.,* Docket No. 15-0380 (issued April 10, 2015).

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

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 22, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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