United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 20-0147**
	)	**Issued: September 20, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Portsmouth, NH, Employer	)	

Appearances:
John L. DeGeneres, Jr., 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 October 24, 2019 appellant, through counsel, filed a timely appeal from a May 15, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted to present arguments regarding her allegation that OWCP's Branch of Hearings and Review routinely denies requests for subpoenas and fails to remand cases to OWCP where a conflict in medical opinion exists. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish right hip and knee osteoarthritis causally related to her accepted factors of her federal employment; and (2) whether a representative of OWCP's Branch of Hearings and Review properly denied her request for the issuance of a subpoena.

FACTUAL HISTORY

On August 24, 2015 appellant, then a 66-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that her right hip and right knee osteoarthritis was accelerated due to factors of her federal employment, including excessive standing, walking, climbing stairs, lifting, twisting, pivoting, and dismounting vehicles over the years. She indicated that she first became aware of her condition and its relation to her federal employment on January 16, 2015. On the reverse side of the claim form, appellant's supervisor indicated that she stopped work on October 31, 2014 and was now retired.

In support of her claim, appellant submitted medical evidence. On December 3, 2012 Dr. Rebecca S. Lee, a Board-certified family practitioner, examined appellant and noted that she had overextended her right knee with residual swelling. On September 10, 2013 Dr. Ellen Bernard, an osteopath, diagnosed leg and hip pain. Appellant underwent right hip and knee x-rays on September 10, 2013, which demonstrated degenerative joint disease of the right knee and degenerative osteoarthritis of the right hip joint.

On November 11 and December 13, 2013 Dr. Kenneth C. Spengler, a Board-certified orthopedic surgeon, diagnosed right hip osteoarthritis. He opined that appellant's symptoms were "definitely aggravated" by her job as a letter carrier, which included prolonged standing. On January 9, 2014 Dr. Thomas F. McGovern, a Board-certified orthopedic surgeon, noted that appellant had advanced osteoarthritis in her hip, which caused pain with activity. He recommended hip replacement surgery. On February 18, 2014 appellant underwent a total right hip arthroplasty.

In a report dated June 2, 2015, Dr. David C. Morley, a Board-certified orthopedic surgeon, noted that appellant had right hip and right knee problems related to the accumulative stress of her job duties. He described appellant's history of injury noting that in the of summer 2012 appellant lost her balance walking down steps and overextended her right knee while in the performance of duty. Appellant reported acute pain. Her right knee and right hip symptoms were worsened by weight bearing. In September 2013 appellant's route required increased climbing of stairs which worsened her right hip pain. Dr. Morley noted that appellant's position also required prolonged standing and walking as well as climbing stairs and that her right knee pain continued following her February 18, 2014 right hip replacement. He reviewed appellant's knee x-rays and found chondrocalcinosis with advanced degenerative joint disease and medial joint space narrowing.

[3] 5 U.S.C. § 8101 *et seq*.

Dr. Morley opined that as a result of the physical demands of her job and the accumulative impact loading, appellant developed advanced right hip arthritis and advanced right knee arthritis. He further opined that appellant's job duties aggravated, exacerbated, hastened, or accelerated the degeneration of her right hip and right knee. Dr. Morley explained that impact loading resulting from repetitive local stresses accelerated the progression of arthritis through a process of chronic inflammation. He indicated that appellant's job as a letter carrier required constant and repetitive walking, squatting, stooping, climbing, bending, lifting, carrying, stair climbing, and twisting activities. Dr. Morley explained that these activities caused a loss of proteoglycan initiated by activation of degradative enzymes associated with the inflammation, and that the loss of proteoglycans resulted in a stiffer cartilage that was more easily damaged by wear and tear. He further explained that as the articular cartilage deteriorated due to mechanical stresses breakdown products from the cartilage were released into the synovial space, then new bone outgrowths were formed on the margins of joints, known as spurs or osteophytes, which were a characteristic of a progression of osteoarthritis. Dr. Morley concluded that the aggravation of appellant's osteoarthritis by her employment activities was permanent due to loss of joint surface. He referenced a series of recent studies that supported his conclusion.

In a September 8, 2015 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

On April 19, 2016 OWCP referred appellant, a statement of accepted facts (SOAF) and a list of specific questions for a second opinion evaluation with Dr. Lawrence M. Leonard, a Board-certified orthopedic surgeon.

In his May 10, 2016 report, Dr. Leonard reviewed the SOAF and medical records. He diagnosed status post right hip total arthroplasty with excellent result and arthritis right knee, questionable chondrocalcinosis etiology, and obesity. Dr. Leonard opined that appellant's diagnosed arthritic conditions were not caused, aggravated, or accelerated by her employment duties. He attributed appellant's right knee arthritis to her 1985 right knee arthroscopic surgery. Dr. Leonard noted that there was a correlation between heavy work and osteoarthritis, but not necessarily causation. He further noted that while appellant's work did not cause her diagnosed hip and knee conditions, prolonged walking and stair climbing would aggravate these conditions. Dr. Leonard concluded that he did not believe that appellant's conditions were aggravated or caused by her employment activities, unless there was temporary aggravation.

By decision dated June 7, 2018, OWCP denied appellant's occupational disease claim finding that she had not established that her diagnosed medical condition was causally related to the accepted factors of her federal employment. On June 30, 2016 appellant, through counsel, requested an oral hearing from a representative of OWCP's Branch of Hearings and Review.

At the hearing held on October 27, 2016, counsel contended that Dr. Leonard's report, in part, supported appellant's occupational disease claim for aggravation of an underlying condition.

By decision dated January 11, 2017, OWCP's hearing representative remanded the case for a supplemental report from Dr. Leonard explaining whether appellant's work caused or

contributed to aggravation of the underlying osteoarthritis of the hips either temporarily or permanently.

On November 1, 2017 OWCP requested a supplemental report from Dr. Leonard addressing whether appellant's preexisting conditions were in some way aggravated or accelerated by her accepted employment duties.

In a January 2, 2018, report, Dr. Leonard reviewed appellant's history of injury and her employment duties. He opined that based on the medical literature, the epidemiological evidence did not establish that appellant's work activities caused or aggravated his arthritis. Dr. Leonard noted that the wear and tear paradigm for osteoarthritis was no longer considered probable, instead it was considered to be an inflammatory disease with a critical role played by adiopokines producing joint injury. He found that appellant's work activity did not appear to reach the level of activity which would constitute a risk of producing either knee or hip osteoarthritis.[4] Dr. Leonard provided an extensive review of the medical literature.

By decision dated September 13, 2018, OWCP denied appellant's occupational disease claim finding that the medical evidence did not demonstrate that the claimed condition was causally related to the accepted employment factors. On September 20, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On October 10, 2018 counsel requested a subpoena for Dr. Leonard. He noted that Dr. Leonard's office was within the appropriate distance and that testimony and questioning was the only way to obtain a full and complete picture of Dr. Leonard's understanding of the definitions of causation.

On February 19 2019 OWCP's hearing representative denied appellant's request for the issuance of a subpoena under 20 C.F.R. § 10.619. She found that he had not established that the only means to obtain information from Dr. Leonard was through a subpoena rather than other methods, such as a written reports, affidavits, or statements. The hearing representative advised that appellant could appeal the denial of the subpoena request after the issuance of her decision if it was not favorable.

On February 28, 2019 counsel appeared at the oral hearing and contended that Dr. Leonard's report was insufficient to resolve the issues of appellant's claim.

By decision dated May 15, 2019, OWCP's hearing representative reviewed counsel's contentions regarding Dr. Leonard's report and OWCP's definitions of causal relationship. She denied appellant's request for a subpoena, and affirmed OWCP's September 13, 2018 decision finding that Dr. Leonard's report constituted the weight of the medical opinion evidence.

[4] Dr. Leonard indicated that he had retired from performing hip surgeries, but not from the practice of medicine.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[6] 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.[7] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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 employment factors identified by the employee.[9]

Rationalized medical opinion evidence is required to establish causal relationship.[10] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[11] 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 caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[12]

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

[5] *Supra* note 2.

[6] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

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

[9] *J.P.*, Docket No. 19-0303 (issued August 13, 2019); *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[10] 20 C.F.R. § 10.110(a); *M.M.*, Docket No. 18-1366 (issued February 27, 2019); *John M. Tornello*, 35 ECAB 234 (1983).

[11] *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

[12] *S.H.*, Docket No. 17-1660 (issued March 27, 2018); *James Mack*, 43 ECAB 321 (1991).

make an examination.[13] 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.[14] When there exists 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]

ANALYSIS

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

Appellant's attending physician, Dr. Morley, completed a June 2, 2015 report and provided a detailed history of injury, an opinion on causal relationship, and detailed medical reasoning explaining why he believed that appellant's right knee and hip osteoarthritis was aggravated and accelerated by her accepted employment activities.

By contrast OWCP's second opinion physician, Dr. Leonard, in his January 2, 2018 report, also based on a proper factual background, determined that appellant's osteoarthritis in her right hip and knee were neither accelerated nor aggravated by her accepted employment duties.

Both Drs. Morley and Leonard provided a description of appellant's employment duties, and provided rationale for their respective opinions based on their review of the medical evidence and physical findings. The Board, therefore, finds that a conflict in medical opinion exists regarding the causal relationship between appellant's diagnosed osteoarthritis and her accepted employment duties.[16]

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of a second opinion physician, OWCP shall appoint a third physician to make an examination.[17] The Board will thus remand the case to OWCP for referral to an impartial medical specialist regarding whether appellant has met her burden of proof to establish that her underlying osteoarthritis of the right hip and right knee were aggravated or accelerated by her accepted employment duties. Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

[13] 5 U.S.C. § 8123(a); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[14] 20 C.F.R. § 10.321.

[15] *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[16] *A.T.*, Docket No. 19-0294 (issued May 29, 2019); *W.B.*, Docket No. 17-1994 (issued June 8, 2018).

[17] 5 U.S.C. § 8123(a); *G.K.*, Docket No. 16-1119 (issued March 16, 2018).

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[18] The representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[19] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[20]

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative properly denied appellant's request for the issuance of a subpoena.

Counsel for appellant requested that OWCP's hearing representative issue a subpoena to obtain testimony from Dr. Leonard. She denied counsel's request, noting that he had not demonstrated that the evidence from Dr. Leonard could not be obtained through other methods, including the submission of a written statement. Appellant, through counsel, has insufficiently explained why a subpoena was the best method to obtain this evidence or shown that there was no other method to obtain the information. The Board finds that OWCP's hearing representative properly denied the subpoena request.[21]

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether appellant has met her burden of proof to establish right hip and knee osteoarthritis causally related to the accepted factors of her federal employment as a conflict in medical opinion exists. The Board further finds that OWCP's hearing representative did not abuse her discretion in denying appellant's request for the issuance of a subpoena.

[18] 20 C.F.R. § 10.619; *P.F.*, Docket No. 19-0547 (issued December 20, 2019); *E.C.*, Docket No. 18-1808 (issued May 16, 2019).

[19] *Id*.

[20] *P.F., supra* note 18; *B.M.*, Docket No. 17-1157 (issued May 22, 2018).

[21] *E.C., supra* note 18; *L.M.*, Docket No. 17-0159 (issued September 27, 2017).

IT IS HEREBY ORDERED THAT the May 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 20, 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