

**United States Department of Labor
Employees' Compensation Appeals Board**

E.F., Appellant

and

**DEPARTMENT OF THE ARMY, TOBYHANNA
ARMY DEPOT, Tobyhanna, PA, Employer**

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**Docket No. 12-34
Issued: August 3, 2012**

Appearances:

Aaron B. Aumiller, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 12, 2011 appellant, through his attorney, filed a timely appeal from the June 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his claim for an employment-related left knee injury.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained a left knee injury in the performance of duty on December 21, 2009, as alleged.

¹ The Board concludes that OWCP's October 12, 2011 decision, purporting to deny reconsideration of the merits, actually conducted a merit review of appellant's claim. *See infra* note 10.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 21, 2009 appellant, then a 46-year-old electronics mechanic, sustained a traumatic injury in the performance of duty: “Was crossing in front of the K-lot parking lot, when in the middle of the crosswalk, was hit in the knee by a yellow Jeep entering the lot.” He described the nature of his injury as a torn right meniscus and bruised right hand.

In his sworn statement to the military police, appellant stated that the bumper of the yellow Jeep hit his right hand, which was at his side and his right leg. The incident report described the injury as minor. The history appellant provided to the health unit that same day was that the yellow Jeep ran into him, hitting his right leg. “Then my right knee started to hurt after walking on after about 5 minutes.” The medical officer described the nature of appellant’s injury as right knee pain.

On or about December 28, 2009 the health unit noted bilateral knee pain, but the medical officer diagnosed right knee contusion and pain. Appellant told his osteopath that he had pain in his right knee more than his left. On examination Thomas G. Majernick, an osteopath, found, among other things, “diffuse mild [tenderness] left knee” with no effusion. He diagnosed sprains and strains of the knee and leg, unspecified.

X-rays of both knees on December 29, 2009 were negative. A magnetic resonance imaging (MRI) scan of the right knee showed a suspected small peripheral tear of the anterior horn of the medial meniscus. An x-ray of the right hand showed no fracture or dislocation. Appellant was diagnosed with a torn right meniscus and right knee contusion and pain.

On January 4, 2010 appellant advised Dr. Majernick that the pain in his right knee had decreased. He did not mention his left knee and Dr. Majernick made no left knee finding on examination. On January 14, 2010 appellant noted some pain in his left knee, but his right knee felt better. Findings include a tender medial left knee. On January 26, 2010 he complained of left knee pain. Appellant used an analgesic without relief. In addition to a tender medial aspect, there was mild edema of the lateral aspect of the left knee. An MRI scan was recommended.

OWCP accepted appellant’s claim for a torn right medial meniscus. He received compensation for a period of wage loss.

On January 29, 2010 an MRI scan of the left knee showed a focal osteochondral defect anteriorly in the medial tibial plateau with a questionable small peripheral tear of the anterior horn of the medial meniscus adjacent to the lesion.

On March 8, 2010 Dr. Edwin S. Malloy, the attending Board-certified orthopedic surgeon, requested authorization to perform an arthroscopy and chondroplasty on the left knee. He noted that appellant was in a lot of pain and needed the procedure as soon as possible.

Appellant claimed wage-loss compensation beginning March 1, 2010. Noting that he was apparently claiming disability compensation for his left knee, OWCP advised that it had accepted only a right knee injury arising on December 21, 2009. It further advised that if appellant wished to claim a left knee injury on that date, he could submit supporting medical evidence.

On March 5, 2010 Dr. Malloy reviewed the left knee MRI scan. He diagnosed pain in the left knee secondary to an injury caused when appellant was struck by a motor vehicle on December 21, 2009. Dr. Malloy recommended an arthroscopic evaluation of the left knee.

On April 29, 2010 Dr. Malloy related that appellant was hit on the right side “but his right and left knee were pushed to the left and he ended up having significant problems with the left knee.”

In a May 25, 2010 decision, OWCP denied appellant’s claim for wage-loss compensation beginning in March 1, 2010. It found that the evidence was not sufficient to establish that his current left knee condition and disability were due to the accepted work injury. OWCP found that appellant failed to submit a rationalized medical opinion explaining how the left knee condition was connected to the December 21, 2009 employment injury. It noted his initial statement, which indicated that the vehicle impacted his right hand and right knee. OWCP noted that the medical evidence supported trauma to the right knee and did not discuss any trauma to the left knee. It found that the history Dr. Malloy later provided -- that appellant’s right and left knee were pushed to the left -- conflicted with appellant’s version of how the injury occurred. Further, OWCP noted that the initial medical evidence did not mention any trauma to the left knee, any complaints of pain to the left knee or any treatment for a left knee condition. It noted no diagnosed left knee condition until March 5, 2010.

Appellant requested reconsideration. He argued that OWCP overlooked very early evidence of left knee problems and diagnoses. Thus, on December 28, 2009 a physician noted pain in the right knee “more than left” and “tender dorsum right wrist, medial right knee and diffuse mild left knee.” Further, on January 14, 2010 a physician noted “some pain left knee” and “tender medial left knee” and on January 26, 2010 a nurse noted “left knee pain -- used Motrin without relief.” The physician noted “tender medial aspect left knee.”

Appellant added that the December 29, 2009 x-ray of the left knee gave the history as “injury.” Another imaging study was obtained on January 29, 2010. Appellant argued that one does not order diagnostic tests unless there are significant complaints of pain and suspicion of injury. He concluded that there clearly was evidence of injury and complaints about his left knee from the inception of his claim, evidence that was certainly sufficient to accept the left knee condition, especially after Dr. Malloy’s March 5, 2010 report.

On June 2, 2011 OWCP denied appellant’s reconsideration request. It found that a review of the evidence of record failed to support a factual basis on which to establish entitlement to benefits for a left knee condition due to the December 21, 2009 work injury. It was important to note, OWCP explained, that appellant never reported an injury to his left knee on this claim form or additional statement. Although various medical reports supported that he had left knee pain, a diagnosis of pain did not constitute a basis for the payment of compensation. Further, as the December 29, 2009 left knee x-ray was negative, there were no objective findings on which to establish a diagnosis.

On appeal, appellant argues that his request advanced a new legal argument not previously considered. Further, he argues that OWCP reviewed the merits of his claim in the guise of a nonmerit review.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.⁴

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁵

Causal relationship is a medical issue⁶ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty⁸ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁹

ANALYSIS

Although OWCP's June 2, 2011 decision purported not to review the merits of appellant's claim, the Board finds that this was a decision on the merits. OWCP did more than provide a background summary of its May 25, 2010 denial; it augmented its previous findings. It acknowledged for the first time that some initial medical evidence indicated left knee pain, but it found that this evidence was insufficient to constitute a basis for the payment of compensation

³ 5 U.S.C. § 8102(a).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); see *George W. Glavis*, 5 ECAB 363 (1953).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁹ See *William E. Enright*, 31 ECAB 426, 430 (1980).

because pain was not a diagnosis. Further, OWCP acknowledged the initial left knee x-ray but found that its negative results offered no objective finding to support a diagnosis. As it addressed the merits of appellant's claim, the Board has jurisdiction to review the merits.¹⁰

The Board has reviewed the contemporaneous accounts of what happened on December 21, 2009 and can find no allegation or claim of a left knee injury. Appellant explained that the bumper of the yellow Jeep struck his right hand and right knee. He did not relate that the vehicle pushed both knees to the left. That history first appears in the April 29, 2010 report of Dr. Malloy, the attending orthopedic surgeon. This does not mean that the incident as described by Dr. Malloy did not in fact occur as alleged, only that the four-month delay in bringing this crucial bit of information to light raises some doubt about the validity of the claim. This history of injury appears only after OWCP advised appellant that if he wanted to pursue a left knee claim, he could submit supporting medical evidence. Appellant has not reconciled the late history of injury with his contemporaneous accounts of what happened on December 21, 2009.

The first medical reference to the left knee came about a week after the accident, when the health unit noted bilateral knee pain. The medical officer, however, offered no left knee diagnosis. Appellant indicated to Dr. Majernick that he had pain in his right knee more than his left, and there was diffuse mild tenderness in the left knee without effusion, but Dr. Majernick made no specific left knee diagnosis. A left knee x-ray was negative and on January 4, 2010 appellant reported no left knee complaints; Dr. Majernick reported no left knee findings or diagnosis. Appellant no longer appeared to have left knee symptomatology.

Beginning January 14, 2010, however, the status of appellant's left knee deteriorated notably. He first reported some pain, and there was tenderness over the medial aspect. By January 26, 2010, appellant's complaints were not relieved by medication and tenderness was now accompanied by edema in the lateral aspect. Three days later, an MRI scan would reveal a focal osteochondral defect anteriorly in the medial tibial plateau with a questionable small meniscal tear adjacent.

After reviewing this MRI scan, Dr. Malloy found that appellant's left knee condition was secondary to an injury caused when appellant was struck by a motor vehicle on December 21, 2009. Although this supported appellant's claim of a left knee injury on that date, he did not support his opinion with sound medical reasoning. The mere temporal relationship between the incident on December 21, 2009 and the MRI scan findings on January 29, 2010 is insufficient, without supporting medical rationale, to establish causal relationship.¹¹

Dr. Malloy later offered the history of both knees being pushed to the left, but as the Board has discussed, that history finds no support in the contemporaneous record. Moreover, he did not explain how pushing the left knee to the left would cause a focal osteochondral defect anteriorly in

¹⁰ See *D.R.*, Docket No. 12-617 (issued May 9, 2012) (OWCP addressed the merits of the claimant's reasons for refusing a job offer); *D.C.*, 58 ECAB (2007) (OWCP addressed the merits by finding for the first time that specialists were available locally and that the claimant's argument was therefore invalid).

¹¹ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

the medial tibial plateau, nor did he discuss the nature of a focal osteochondral defect or explain how such an injury would cause only slight mention of the left knee beginning December 28, 2009, an apparent lack of symptomatology by January 4, 2010, and a notable worsening of symptomatology in the second half of that month.

Appellant's left knee claim faces two basic challenges. The history Dr. Malloy provided that the yellow Jeep pushed appellant's left knee to the left cannot be found in the most contemporaneous and therefore most reliable accounts of what happened that day. Appellant did not make that allegation when he was describing the incident to the military police, to the health unit and to his attending physicians and nurses. Further, he has not submitted a well-rationalized medical opinion based on a complete and accurate factual and medical background explaining how the December 21, 2009 injury caused the specific medical condition claimed.

The Board finds, therefore, that appellant has not met his burden of proof to establish that he sustained a left knee injury in the performance of duty on December 21, 2009, as alleged. The Board will affirm OWCP's June 2, 2011 merit decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he sustained a left knee injury in the performance of duty on December 21, 2009, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2011 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board