

On appeal appellant's attorney asserts that the medical evidence established that appellant sustained a recurrence of disability on July 18, 2011 and a second recurrence on August 8, 2011.²

FACTUAL HISTORY

On April 27, 2011 appellant, then a 39-year-old clerk, filed a traumatic injury claim alleging that she sustained a right knee injury that day while clearing a jam. She stopped work that day. OWCP accepted that she sustained a right knee sprain, and she was referred to a nurse for medical management. Appellant received continuation of pay and wage-loss compensation for disability.

In reports dated July 14, 2011, Dr. J. Lee Berger, an attending Board-certified orthopedic surgeon, stated that appellant had recently had a magnetic resonance imaging (MRI) scan study of the right knee that showed postoperative changes and Grade 4 chondromalacia, which had been seen previously when she had arthroscopic surgery on June 14, 2010. He indicated that the MRI scan study did not show an obvious new tear. On examination appellant had normal shape and contour of the right knee with no instability to stress testing and some tenderness over the lateral compartment. He diagnosed residual pain due to the June 14, 2010 surgery and advised that appellant could return to work on July 18, 2011 without restrictions.

On July 18, 2011 appellant returned to work for approximately two hours. She filed a recurrence claim, stating that walking and pressure on her knee caused pain. The employing establishment controverted the recurrence of disability claim.

Appellant submitted an emergency room record dated July 18, 2011. Dr. Gregory Neyman indicated that she was brought in by ambulance for recurring right knee pain. The past medical history noted that she had right knee arthroscopic surgery in June 2010. Examination of the right knee demonstrated tenderness to palpation, and intact range of motion, distal neurosensory and pulses. Knee pain was diagnosed.

In reports dated July 28, 2011, Dr. Berger noted that appellant had right knee pain status post a microfracture for chondromalacia of the lateral tibial plateau for which she had arthroscopy in June 2010. He advised that she could work eight hours a day with standing and walking limited to four hours, with no bending, and a five-pound lifting restriction. Dr. Berger recommended sedentary work. He reiterated his conclusions in an August 9, 2011 report.

Appellant accepted a modified mail processing clerk position, effective August 9, 2011, under protest. She subsequently filed a claim for compensation for the period August 13 to 26, 2011.

In September 19, 2011 reports, Dr. Berger advised that appellant could not work until further notice, indicating that her current condition was due to the April 27, 2011 work injury and recommended a course of right knee injections.

² The Board notes that appellant's attorney references a July 16, 2011 recurrence of disability. On appellant's recurrence claim dated July 18, 2011, she indicated that she sustained a recurrence of disability at 2:10 p.m. that day. Regarding the second recurrence claimed on October 17, 2011 appellant filed a claim alleging that she sustained a recurrence of disability on August 8, 2011. The August 8, 2011 claimed recurrence has been adjudicated separately by OWCP and is not at issue in this appeal.

By decision dated October 20, 2011, OWCP denied appellant's claim for a recurrence of disability for the period July 18 through August 26, 2011 because the medical evidence indicated that her disability was due to the preexisting microfracture of the right knee lateral tibial plateau.

On October 31, 2011 Dr. Berger advised that appellant could return to work without restrictions on November 7, 2011. Appellant underwent a number of right knee injections.

Appellant, through her attorney, timely requested a hearing, that was held on February 6, 2012. She testified that she did not file a workers' compensation claim for the June 2010 right knee injury, for which she had surgery. Appellant returned to work in November 2010 and worked full duty successfully until she felt something pop in her right knee on April 27, 2011. She stated that she was still limping when she returned to work on July 11, 2011, but experienced severe pain and could not stand or walk and had to be transported to the emergency room. Appellant stated that Dr. Berger placed restrictions on standing, walking, bending, and lifting, and the employing establishment had no limited duty within these restrictions. She indicated that the right knee injections helped and she successfully returned to full duty on November 6, 2011. Appellant's attorney contended that the workers' compensation nurse pressured Dr. Berger to return appellant to work in July 2011.

In an April 10, 2012 decision, an OWCP hearing representative affirmed the October 20, 2011 decision, finding that appellant did not meet her burden of proof to establish that her disability for the period July 16 through August 26, 2011 was causally related to the April 27, 2011 employment injury.

On April 13, 2012 appellant's attorney requested reconsideration. He asserted that the hearing representative did not fully state the history of the case asserting that Dr. Berger's reports were sufficient to establish disability. Counsel resubmitted Dr. Berger's September 19, 2011 report.

In a nonmerit decision dated April 25, 2012, OWCP denied appellant's request for reconsideration on the grounds that appellant's argument was inaccurate and immaterial and the evidence submitted was repetitious.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."³ A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that

³ 20 C.F.R. § 10.5(x); R.S., 58 ECAB 362 (2007).

conclusion with sound medical reasoning.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵

Under FECA, the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁶ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷

ANALYSIS -- ISSUE 1

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

OWCP accepted appellant’s claim that she sustained a right knee sprain on April 27, 2011. Appellant received continuation of pay and wage-loss compensation until July 18, 2011, when she returned to work for two hours. She filed a recurrence of disability claim that OWCP denied on October 20, 2011, on the grounds that the medical evidence indicated that her disability was due to the preexisting microfracture of 2010 that was not employment related. This decision was affirmed by an OWCP hearing representative on April 10, 2012 who found that appellant did not meet her burden of proof to establish that the claimed disability from July 16 through August 26, 2011 was causally related to the April 27, 2011 employment injury.

In a July 14, 2011 report, Dr. Berger, the attending orthopedic surgeon, advised that appellant could return to work without restrictions. In reports dated July 28 and August 9, 2011, he advised that appellant had right knee pain due to the microfracture for which she had surgery in June 2010. Dr. Berger provided restrictions to her physical activity. It was not until September 19, 2011 that he advised that appellant could not work until further notice and indicated that her current disability was due to the April 27, 2011 employment injury. Dr. Berger’s opinion regarding the period of disability at issue is not clear as to the cause of appellant’s disability beginning July 18, 2011. He provided some support for causal relationship to the April 27, 2011 injury and his opinion requires clarification. Medical opinion regarding causal relationship must explain from a medical perspective how the current condition is related to the injury.⁸

⁴ *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁵ *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁶ 20 C.F.R. § 10.5(f); *Cheryl Decavitch*, 50 ECAB 397 (1999).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *See Joan R. Donovan*, 54 ECAB 615 (2003).

On remand, OWCP should ask Dr. Berger to clarify his opinion regarding appellant's disability for the period claimed. Dr. Berger needs to reconcile the July 14, 2011 release for work without restrictions with the restrictions he subsequently imposed and his opinion that she was totally disabled due to the April 27, 2011 employment injury in September. He needs to clarify whether her disability arises from the accepted knee sprain of April 2011 or is related to the preexisting 2010 injury, for which surgery was performed. After this and such further development deemed necessary, OWCP shall issue an appropriate decision.

In light of the Board's finding issue two is rendered moot.

CONCLUSION

The Board finds this case is not in posture for decision as to whether appellant sustained a recurrence of disability beginning July 18, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 25 and 10, 2012 are set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: May 10, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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