

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

J.H., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS & BORDER PROTECTION,
Blaire, WA, Employer**

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**Docket No. 17-0727
Issued: August 4, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 13, 2017 appellant, through counsel, filed a timely appeal from a December 22, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 The record also contains a November 22, 2016 OWCP decision with respect to permanent impairment. Counsel did not request review of this decision, and the record indicates that counsel is pursuing appeal rights with OWCP.

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established a recurrence of medical condition commencing June 10, 2010, causally related to his accepted March 9, 2003 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 15, 2003 appellant, then a 36-year-old customs inspector, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury on March 9, 2003. He indicated that he was participating in a physical techniques drill, when a student tried to pick him up from the floor. The claim was accepted for a medial meniscus tear of the left knee. On August 8, 2003 appellant underwent a left knee meniscectomy performed by Dr. Michael Gannon, a Board-certified orthopedic surgeon. He received compensation for total disability from December 19, 2003 through June 11, 2005, when he returned to work in the private sector.⁵

In a report dated May 2, 2006, Dr. Ralph Belle, a Board-certified orthopedic surgeon, indicated that an April 6, 2006 magnetic resonance imaging (MRI) scan showed a horizontal tear of the medial meniscus posterior horn, as well as moderate degenerative changes in the medial compartment. He diagnosed left knee osteoarthritis, and wrote that appellant had returned to work after the knee surgery and as a result has knee "flared again" and had never really recovered.

On June 21, 2010 appellant filed a claim for a recurrence of disability (Form CA-2a) and indicated that he was claiming medical treatment only. He identified the date of recurrence as June 10, 2010. Appellant wrote that repetitive work activities had exacerbated his original injury.

In a June 15, 2010 report, Dr. Gidon Frame, a family practitioner, wrote that appellant had worsening disability and pain from the left knee injury.

By decision dated August 9, 2010, OWCP denied appellant's recurrence claim. It found that the medical evidence of record was insufficient to show that appellant's current medical condition was due to the accepted work injury.

On August 25, 2010 appellant requested review of the written record by an OWCP hearing representative. In a report dated August 5, 2010, Dr. Frame opined that appellant's March 9, 2003 workplace injury was the direct cause of the left knee medial meniscus tear and the degenerative damage. He wrote that there was no evidence of any other cause, and the left knee condition would persist indefinitely.

⁴ Docket No. 11-0666 (issued November 4, 2011); Docket No. 06-1565 (issued February 20, 2007).

⁵ Docket No. 06-1565 (issued February 20, 2007). The Board set aside a December 5, 2005 OWCP decision finding that appellant's prerecoupment hearing request was untimely.

By decision dated December 7, 2010, an OWCP hearing representative affirmed the August 5, 2010 decision. He found the evidence submitted failed to establish that appellant's left knee condition after June 10, 2010 was causally related to the accepted March 2003 work injury.

On January 25, 2011 appellant filed a timely appeal with the Board. The Board affirmed the August 9 and December 7, 2010 OWCP decisions,⁶ finding that the evidence of record was insufficient to establish that appellant's current condition was causally related to the employment injury.

On May 1, 2012 appellant, through counsel, submitted an April 26, 2012 letter requesting a "reopening" of the claim. The medical evidence submitted included a report dated March 14, 2012 from Dr. Eric Smith, Board-certified in occupational medicine. Dr. Smith opined that appellant's tear and subsequent repair of the torn meniscus was the reason for the findings on a March 28, 2011 MRI scan, which showed the meniscus was dysmorphic in shape and diminutive in size. He noted that the five-year follow-up study showed that, despite good functional outcomes, the meniscectomies resulted in cartilage wear and degenerative changes. Dr. Smith wrote that the middle portion of the medial meniscus was often a weight bearing portion of the cartilage and surgery can cause faster degenerative changes. He opined that the 2003 complex meniscal tear was a significant precipitating event that left appellant with severe left knee arthritis.

OWCP did not respond to the April 26, 2012 letter requesting to reopen the case. On April 24, 2015 appellant submitted an April 19, 2015 letter noting that a request to reopen the claim had been submitted. By letter dated May 4, 2015, OWCP acknowledged receiving the April 26, 2012 letter. It requested that appellant submit evidence that counsel at that time was authorized to represent appellant. On May 27, 2015 OWCP received appellant's authorization for counsel.

By decision dated June 9, 2015, OWCP reviewed the merits and denied modification. It found the medical evidence submitted was insufficient to establish a recurrence of an employment-related medical condition.

On October 6, 2015 appellant submitted a claim for compensation (Form CA-7) and indicated he was claiming a schedule award.

On May 16, 2016 appellant, through counsel requested reconsideration of the June 9, 2015 OWCP decision. He submitted a May 9, 2016 report from Dr. Smith, who diagnosed left knee arthritis. Dr. Smith opined that it was medically logical that the initial injury could ultimately show increasing arthritis, and to say that the arthritis arose otherwise would be illogical. He further opined that the osteoarthritis was traumatic in nature and can directly be attributed to his March 9, 2003 employment injury. Dr. Smith wrote that, while the left knee condition may have been preexisting, it was clearly and substantially aggravated by the employment injury.

⁶ Docket No. 11-0666 (issued November 4, 2011).

With respect to claim for a schedule award, by decision dated June 8, 2016, an OWCP hearing representative remanded the case to OWCP for further development of the medical evidence. As part of the development of the evidence, OWCP referred the case to an OWCP district medical adviser (DMA). The DMA was asked to review the reports from Dr. Smith dated March 14, 2012 and May 9, 2016.

In a report dated August 4, 2016, the DMA, Dr. Michael Katz, a Board-certified orthopedic surgeon, wrote that there was no permanent impairment report. He further opined: "Dr. Smith presents a well-reasoned narrative in favor of upgrading this claim to include the diagnosis of osteoarthritis, knee, permanent aggravation. Based on the findings documented in the operative report of [August 7, 2003], I would agree with him that the osteoarthritis may have predated the injury; however, the necessity for the microfracture and the performance of the partial meniscectomy are clearly linked with the progression of arthritis in a knee, and for that reason it is my opinion that there is sufficient evidence to support upgrading this claim to include osteoarthritis, left knee, permanent aggravation."

By decision dated December 22, 2016, OWCP reviewed the merits of the claim, but denied modification. It found that the medical evidence from Dr. Smith dated May 9, 2016 was insufficient to establish an employment-related osteoarthritis. OWCP did not mention the August 4, 2016 report from Dr. Katz.

LEGAL PRECEDENT

When a claim for a recurrence of medical condition is made more than 90 days after release from medical care, a claimant is responsible for submitting a medical report that contains a description of objective findings and supports causal relationship between the claimant's current condition and the previous work injury.⁷

ANALYSIS

In the present case, the accepted injury was a left knee medial meniscus tear resulting from a March 9, 2003 employment injury. Appellant filed a claim for a recurrence of a medical condition on or after June 10, 2010. In the prior appeal, the Board found the medical evidence at that time failed to establish left knee arthritis or any other condition as causally related to the March 9, 2003 employment injury.

The December 22, 2016 OWCP decision finds that appellant failed to establish a recurrence of a medical condition, but it fails to address the relevant evidence of record. In an August 4, 2016 report, Dr. Katz reviewed the reports of Dr. Smith dated March 14, 2012 and May 9, 2016. He opined that a permanent aggravation left knee osteoarthritis was established by the medical evidence. OWCP gave no indication in the December 22, 2016 decision that it reviewed the evidence of record from Dr. Katz.

The August 4, 2016 report was clearly relevant to the issue presented, as the medical condition claimed as a recurrence was osteoarthritis. It is well established that OWCP must

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.4(b) (June 2013).

properly consider all relevant evidence of record before issuing a decision.⁸ As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by OWCP.⁹

This case will be remanded for a proper decision on the issue of a recurrence of a medical condition on or after June 10, 2010. OWCP should review all of the relevant evidence with respect to the issue presented and issue a *de novo* decision on the merits following any necessary further development.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2016 is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: August 4, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ See *N.L.*, Docket No. 17-0454 (issued April 6, 2017); *S.D.*, Docket No. 16-1866 (issued January 17, 2017); *William A. Couch*, 41 ECAB 548, 553 (1990).

⁹ *Id.*