

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

S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Plainfield, NJ, Employer**

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**Docket No. 17-1319
Issued: December 7, 2017**

Appearances:

James D. Muirhead, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 30, 2017 appellant, through counsel, filed a timely appeal from a December 19, 2016 merit decision and an April 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established disability from work on or after June 21, 2012 due to a work-related left knee condition; (2) whether OWCP properly denied authorization of appellant's October 22, 2012 left knee surgery; and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on October 5, 2009 appellant, then a 34-year-old letter carrier, sustained a medial meniscus tear of her left knee due to a fall down stairs at work. The claim was assigned File No. xxxxxx003. Appellant stopped work on October 5, 2009 and began to receive compensation on the daily rolls.⁴

On January 12, 2010 Dr. Jeffrey F. Augustin, an attending Board-certified orthopedic surgeon, performed a left knee arthroscopy with lateral meniscectomy and excision of plica. The surgery was authorized by OWCP.

In a June 17, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 17, 2010, because she ceased to have residuals of her October 5, 2009 work injury as of that date. It based its termination action on a May 30, 2010 report of Dr. Augustin and a May 3, 2010 report of Dr. Jerome D. Rosman, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.

By decision dated November 17, 2010, OWCP modified its June 17, 2010 termination decision to reflect that only appellant's wage-loss compensation was terminated, effective June 17, 2010. It explained that the May 12, 2010 notice of proposed termination failed to mention that medical benefits related to the October 5, 2009 work injury would be terminated.

On June 21, 2012 appellant filed a traumatic injury claim (Form CA-1) alleging that she injured her left knee at work on June 20, 2012 when she stepped down off a curb. She indicated that she felt a tug and twist in her knee and heard a popping sound. OWCP assigned the claim File No. xxxxxx402.⁵

³ Docket Nos. 14-1187 and 14-1215 (issued February 2, 2015).

⁴ Appellant later began to receive compensation on the periodic rolls.

⁵ This claim was initially developed under File No. xxxxxx402, but beginning in early 2013 the documents for this claim were administratively combined with File No. xxxxxx003, the file created for appellant's October 5, 2009 employment injury.

In an August 9, 2012 decision, OWCP denied appellant's traumatic injury claim in File No. xxxxxx402 because had not submitted sufficient medical evidence to establish that she sustained a left knee injury in the performance of duty on June 20, 2012.

On October 22, 2012 Dr. Allen Glushakow, an attending Board-certified orthopedic surgeon, performed left knee surgery, including abrasion arthroplasty, chondroplasty, arthrotomy, and partial lateral meniscectomy. He noted that during the surgery he observed an effusion, an osteochondral fracture of the medial femoral condyle, and an acute tear of the lateral meniscus. The surgery was not authorized by OWCP.

By decision dated February 20, 2013, an OWCP hearing representative modified OWCP's August 9, 2012 decision to accept the condition of left knee sprain as occurring on June 20, 2012 "with entitlement to medical benefits being limited to the claimant's emergency room visit on June 20, 2012." He noted, "The district [office's] denial of the claim for any other left knee condition and for benefits subsequent to June 20, 2012 is affirmed."

In an April 30, 2013 decision, OWCP advised appellant that her claim for a traumatic injury on June 20, 2012 was formally accepted for a left knee sprain. It noted that, per the hearing representative's February 20, 2013 decision, authorization for medical treatment was limited to treatment at the emergency room on June 20, 2012. OWCP further noted, "If the current accepted condition(s) need to be revised or additional complications related to the current accepted condition(s) need to be added, your physician should explain in writing, with medical rationale, the relationship between any additional condition and the work injury or the current accepted condition(s) noted above."

On May 10, 2013 appellant filed claims for compensation (Form CA-7) for the periods June 21 through October 21, 2012 and October 22, 2012 through March 18, 2013.⁶ The first period of compensation was filed under File No. xxxxxx402 and the latter period under File No. xxxxxx003. With respect to the period, June 21 through October 21, 2012, OWCP advised appellant by letter dated May 13, 2013 that she should pursue her appeal rights associated with the February 20, 2013 decision.

In an informational letter dated June 10, 2013, OWCP advised appellant that her claim for compensation for the period October 22, 2012 to March 18, 2013 was not payable. It explained her that in its November 17, 2010 decision, it had terminated her wage-loss compensation, effective June 17, 2010.

In a July 17, 2013 letter received on that date, counsel, on behalf of appellant, sought compensation for her October 22, 2012 left knee surgery and any periods of disability related to her accepted work-related knee condition. He noted, "[Appellant] underwent surgery by

⁶ The employing establishment advised that appellant's employment had been terminated, effective November 27, 2012, due to the expiration of her appointment.

Dr. Glushakow under the above file in October 2012. Clearly, this is new evidence and was not available on June 17, 2010. Appellant is now disabled as a result of the effects of the surgery.”⁷

In a November 14, 2013 decision, OWCP denied appellant’s July 17, 2013 reconsideration request, finding that it was untimely filed with respect to the November 17, 2010 decision and failed to demonstrate clear evidence of error. It indicated that the June 10, 2013 “decision” for which she was considered to have requested reconsideration was an informational letter rather than a final decision of OWCP, and therefore, she could not request reconsideration of that decision. OWCP further noted, “Your attorney does not argue that the decision dated November 17, 2010 was incorrect when it was issued.”

On January 10, 2014 appellant filed a recurrence claim (Form CA-2a) for disability from work due to her work-related left knee condition, commencing June 21, 2012. She filed a similar claim under OWCP File No. xxxxxx003 for a recurrence of disability commencing October 22, 2012.

In an informational letter dated February 26, 2014, OWCP referenced both of appellant’s left lower extremity traumatic injury claims and advised her that it had only accepted that she sustained a left knee sprain on June 20, 2012 and that her case was only open for payment of medical bills related to an emergency room visit on June 20, 2012. It further noted that appellant had previously been provided with appeal rights in connection with prior decisions on this matter.

In a March 5, 2014 letter, counsel, on behalf of appellant, indicated that he was submitting evidence which he felt supported coverage of her October 22, 2012 surgery. In the attached June 25, 2013 report, Dr. Glushakow explained why he felt that appellant’s need for repeat left knee surgery on October 22, 2012 was due to her June 20, 2012 injury rather than an earlier injury. He noted that, while the October 22, 2012 operative report did not show a tear of the medial meniscus, there was an effusion and osteochondral fracture of the medial femoral condyle, as well as an acute tear of the lateral meniscus. Dr. Glushakow advised that marked synovitis was noted requiring a subtotal synovectomy, all of which was described in the operative report. He indicated that appellant had fully recovered from the January 12, 2010 surgery and that prior operative reports did not note an osteochondral fracture and did not note synovitis. Dr. Glushakow noted, “Therefore, the combination of these findings point to the cause of [appellant’s] surgery being the incident of June 20, 2012.”

In a March 19, 2014 decision, OWCP denied appellant’s March 5, 2014 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error in OWCP’s prior decisions, including its decision dated April 30, 2013.

Appellant appealed to the Board and, in a February 2, 2015 decision,⁸ the Board set aside OWCP’s November 14, 2013 and March 19, 2014 decisions, and remanded the case to OWCP

⁷ Counsel also stated that he wished to “appeal” June 17, 2010 and June 10, 2013 “decisions” of OWCP. As noted herein, the June 10, 2013 document was an informational letter rather than a final decision of OWCP.

⁸ See *supra* note 3.

for further development. The Board found that OWCP improperly determined that counsel's communications on behalf of appellant constituted a request for reconsideration of its November 17, 2010 decision, which modified its June 17, 2010 termination decision to reflect that only her wage-loss compensation was terminated effective June 17, 2010. The Board found that counsel expressly sought compensation for her October 22, 2012 left knee surgery and any periods of disability related to her accepted left knee condition(s). Consequently, OWCP improperly analyzed appellant's case and wrongly determined, in its November 14, 2013 and March 19, 2014 decisions, that she filed an untimely request for reconsideration and failed to demonstrate clear evidence of error in its November 17, 2010 decision. The Board found that she had an outstanding claim related to her October 22, 2012 left knee surgery and any periods of disability arising after June 21, 2012. The Board remanded the case to OWCP for consideration of that claim and directed OWCP to consider all the relevant documents relating to both appellant's accepted October 5, 2009 left knee injury and her accepted June 20, 2012 left knee injury. After carrying out this development, OWCP was directed to issue an appropriate decision on the matter.

On remand, OWCP issued a June 11, 2015 decision appellant's request for authorization of her October 22, 2012 surgery and her claim for a recurrence of disability commencing June 21, 2012. It found that she failed to submit sufficient medical evidence in support of her claim.

Appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, OWCP's hearing representative determined, in a January 8, 2016 decision, that OWCP's June 11, 2015 decision must be set aside and the case remanded to OWCP for further development. She indicated that the case should be forwarded to an OWCP medical adviser to address Dr. Glushakow's medical opinions regarding the October 22, 2012 surgery and to discuss whether there were additional medical conditions causally related to the work injury of June 20, 2012. OWCP's medical adviser should be asked whether referral to a second opinion examiner would be appropriate. The hearing representative noted that, after any additional development deemed necessary, OWCP should issue a *de novo* decision as to whether appellant was disabled from June 21, 2012 and continuing and whether the left knee surgery on October 22, 2012 was causally related to the June 20, 2012 work event.

On remand, OWCP determined that appellant and the case record should be referred to a second opinion examiner. A second opinion examination referral was made to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, regarding the surgery and disability matters.

In a report dated November 10, 2016, Dr. Henderson advised that the October 22, 2012 surgical procedure was not secondary to the work injury that occurred on October 5, 2009. He indicated that appellant suffered from a lateral meniscus tear,⁹ which was repaired and advised that there was no further need for additional treatment regarding the work injury. Dr. Henderson noted that she appeared to have recently sustained a new injury to her left meniscus, but that this injury would not be a work injury. He indicated that appellant described symptoms of locking in the recent past which did not clinically correlate to the work injury. Dr. Henderson did not

⁹ OWCP accepted appellant's October 5, 2009 injury for left knee "medial" meniscus tear.

recommend a work capacity evaluation or work hardening program and indicated that she had reached maximum medical improvement (MMI). He noted that the June 20, 2012 injury caused an aggravation of arthritis, but indicated that the aggravation was temporary and had ceased at this time. Dr. Henderson noted that the aggravation caused disability during appellant's employment and posited that she suffered disability from her arthritis. Appellant had partial disability related to her degenerative changes and not the work injury. Dr. Henderson also noted that she had not been totally disabled from June 21, 2012 and posited that she could perform sedentary work.

On November 22, 2016 OWCP requested that Dr. Henderson clarify whether it should update the accepted conditions to include aggravation of osteoarthritis in the left knee and whether the restrictions provided were due to the work injury of October 5, 2009 or June 20, 2012.

In an addendum report dated December 2, 2016, Dr. Henderson indicated that the work-related aggravation of arthritis was temporary and had ceased at this time. He noted that he inadvertently determined that this condition caused disability during appellant's employment, when in fact it was the work incident that caused the disability. Dr. Henderson noted that the accepted conditions should not be updated to include aggravation of left knee osteoarthritis.

In a December 19, 2016 decision, OWCP found that appellant had not met her burden of proof to establish disability commencing June 21, 2012 due to a work-related condition. It also exercised its discretion and denied authorization for her October 22, 2012 left knee surgery.

On March 9, 2017 counsel, on behalf of appellant, requested reconsideration of OWCP's December 19, 2016 decision. Counsel argued that Dr. Henderson's November 10 and December 2, 2016 reports were not well-rationalized as he did not adequately explain why her June 20, 2012 employment injury did not cause disability on or after June 21, 2012 or why the October 22, 2012 surgery was not necessitated by a work-related condition.

In an April 6, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the argument submitted by counsel on behalf of appellant did not present a new and relevant legal argument.

LEGAL PRECEDENT -- ISSUES 1 & 2

An employee seeking benefits under FECA¹⁰ 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, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹¹ In general the term disability under FECA means

¹⁰ *Supra* note 2.

¹¹ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.¹² This meaning, for brevity, is expressed as disability from work.¹³

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 factors identified by the claimant.¹⁴

Section 8103(a) of FECA states in pertinent part: “The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.”¹⁵

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.¹⁶ The only limitation on the OWCP’s authority is that of reasonableness.¹⁷ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁸ In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹⁹ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.²⁰

ANALYSIS -- ISSUES 1 & 2

The Board finds that the case is not posture for decision due to an unresolved conflict in the medical evidence between Dr. Henderson, who served as an OWCP referral physician, and Dr. Glushakow, an attending physician, regarding whether appellant’s October 22, 2012 surgery

¹² See 20 C.F.R. § 10.5(f).

¹³ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); see also *A.M.*, Docket No. 09-1895 (issued April 23, 2010).

¹⁴ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁵ 5 U.S.C. § 8103.

¹⁶ *Vicky C. Randall*, 51 ECAB 357 (2000).

¹⁷ *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

¹⁸ *Rosa Lee Jones*, 36 ECAB 679 (1985).

¹⁹ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

²⁰ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

was necessitated by a work-related condition and whether she established disability on or after June 21, 2012 due to a work-related condition.

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.”²¹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.²²

In his November 10, 2016 report, Dr. Henderson advised that the October 22, 2012 surgical procedure was not secondary to the work injury, which occurred on October 5, 2009. He indicated that appellant suffered from a lateral meniscus tear which was repaired and advised that there was no further need for additional treatment regarding the work injury. Dr. Henderson noted that she appeared to have recently sustained a new injury to her left meniscus, but that this injury would not be a work injury. He indicated that appellant described symptoms of locking in the recent past which did not clinically correlate to the work injury. Dr. Henderson did not recommend a work capacity evaluation or work hardening program and indicated that she had reached MMI. He noted that the June 20, 2012 injury caused an aggravation of arthritis, but indicated that the aggravation was temporary and had ceased at this time. Dr. Henderson noted that the aggravation caused disability during appellant’s employment and posited that she suffered disability from her arthritis. Appellant had partial disability related to her degenerative changes and not the work injury. Dr. Henderson also noted that she had not been totally disabled from June 21, 2012 and posited that she could perform sedentary work. In an addendum report dated December 2, 2016, he indicated that the work-related aggravation of arthritis was temporary and had ceased at this time. Dr. Henderson noted that he inadvertently determined that this condition had caused disability during appellant’s employment, when in fact it was the work incident that caused the disability. He noted that the accepted conditions should not be updated to include aggravation of left knee osteoarthritis.

In contrast, Dr. Glushakow explained in his June 25, 2013 report why he felt that appellant’s need for repeat left knee surgery on October 22, 2012 was due to her June 20, 2012 injury rather than an earlier injury. He noted that, while the October 22, 2012 operative report did not show a tear of the medial meniscus, there was an effusion and osteochondral fracture of the medial femoral condyle, as well as an acute tear of the lateral meniscus. Dr. Glushakow advised that a marked synovitis was noted requiring a subtotal synovectomy, all of which was described in the operative report. He indicated that appellant had made a full recovery from the surgery performed on January 12, 2010 and that prior operative reports did not note an osteochondral fracture and did not note synovitis. Dr. Glushakow noted, “Therefore, the combination of these findings point to the cause of [appellant’s] surgery being the incident of June 20, 2012.”

²¹ 5 U.S.C. § 8123(a).

²² *William C. Bush*, 40 ECAB 1064, 1975 (1989).

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Dr. Henderson and Dr. Glushakow regarding whether appellant's October 22, 2012 surgery was necessitated by a work-related condition and whether she established disability on or after June 21, 2012 due to a work-related condition. On remand, OWCP should refer her, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After carrying out this development, it shall issue a *de novo* decision regarding appellant's claim.²³

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2017 and December 19, 2016 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further action consistent with this decision.

Issued: December 7, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²³ Given the Board's disposition of the merits of this case, it is unnecessary to consider whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).