

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

P.S., Appellant

and

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

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**Docket No. 17-0194
Issued: July 27, 2017**

Appearances:

Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 7, 2016 appellant, through counsel, filed a timely appeal from a September 27, 2016 merit 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty.

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.*

FACTUAL HISTORY

On July 10, 2015 appellant, then a 58-year-old customer care agent, filed an occupational disease claim (Form CA-2) alleging that she developed right knee bone deterioration as a result of repetitive walking at work. She explained that she had to walk many steps to get to her desk at the call center, and to and from the bathroom and breakroom. Appellant alleged that the amount of walking required exceeded her restrictions which were provided due to a meniscal operation in 2008. She also alleged that during bad winter weather she slipped many times while walking. Appellant reported that she had previously filed recurrence claims (Form CA-2a) under OWCP File Nos. xxxxxx771³ and xxxxxx770⁴ which were denied, and that all her medical reports were sent to OWCP under these file numbers. She stopped work on April 26, 2014⁵ and retired in February 2015.

In a handwritten statement, appellant indicated that when she was offered a job as a call center agent she did not realize that the call center office was all the way at the back of the plant. She explained that her cane got stuck on the turn stile doors and she often tripped on the carpet. Appellant also related a specific instance when a young man accidentally slammed into her, causing her to hit her right knee into the wall. She further described how there was only one disability toilet in the bathroom, which was always occupied, so she had to bend her knees more. Appellant indicated that she was always rushed to go to the bathroom, to lunch, or on breaks and that her right knee had worsened to the point that it went out when she started walking.

On July 13, 2015 OWCP received a letter from the employing establishment controverting appellant's occupational disease claim. It pointed out that she had previously filed a claim for the same condition, which was denied. The employing establishment noted that appellant also filed a recurrence claim on July 24, 2014 under OWCP File No. xxxxxx771, which was denied. It asserted that her current occupational disease claim should be denied because it was for the same injury.

By letter dated August 19, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she provide a detailed description of the employment-related activities she believed contributed to her condition and a medical report from a physician to establish a medical diagnosis causally related to her employment. Appellant was afforded 30 days to submit the additional evidence. A similar letter requesting additional information was sent to the employing establishment.

³ OWCP accepted that on April 2, 2008 appellant sustained a right knee medial meniscus tear in the performance of duty. In August 2011 appellant was granted a schedule award for 16 percent permanent right lower extremity permanent impairment.

⁴ Appellant filed a recurrence claim (Form CA-2a) alleging that on April 18, 2014 she experienced a recurrence of the April 2, 2008 employment injury. OWCP denied the recurrence claim in a decision dated January 8, 2015. Appellant also requested authorization for right knee surgery, which OWCP denied in a decision dated June 4, 2015.

⁵ Appellant also has two previously accepted traumatic injury claims for a September 1, 2003 employment injury (OWCP File No. xxxxxx896) and for an April 6, 2009 employment injury (OWCP File No. xxxxxx545).

Appellant was treated by Dr. Michael Cunningham, a Board-certified orthopedic surgeon. In a September 10, 2015 report, Dr. Cunningham related appellant's complaints of persistent, severe right knee pain. He related that appellant reported frequent collapsing episodes and mentioned a specific April 9, 2014 collapsing episode on a ramp at work. Dr. Cunningham reviewed appellant's history and provided physical examination findings. He observed that appellant's gait was severely antalgic because of right knee pain. Dr. Cunningham also reported tenderness over both the medial and lateral joint lines and some valgus deformity. He noted that radiographs taken that day revealed moderately severe degenerative changes, tricompartmentally with mild subluxations, subchondral cystic changes, especially in the medial compartment, and severe patellofemoral arthrosis. Dr. Cunningham diagnosed right knee osteoarthritis, moderately severe, and associated meniscal tears with exacerbation of symptoms by a fall that occurred on April 9, 2014. He recommended right total knee replacement surgery.

In a letter dated September 18, 2015, A.S., appellant's supervisor, noted that appellant was already walking unsteadily with an unusual gait when she first worked at the employing establishment. He reported that he also had no knowledge of her alleged near falls while walking into work and that she did not report any alleged near fall to him. A.S. explained that customer care agents were only required to perform sedentary work, including entering information with a keyboard and mouse intermittently. He pointed out that there was no requirement to lift, push, pull, bend, or stoop. A.S. related that, prior to filing her claim, appellant had not communicated that she was experiencing any pain or difficulty in performing her assigned duties, and had not requested any accommodation. The employing establishment provided a description of appellant's position.

Dr. Cunningham provided a duty status note dated October 8, 2015, which reported a diagnosis of right knee osteoarthritis. He indicated that a magnetic resonance imaging (MRI) scan showed meniscal tear and osteoarthritis of appellant's right knee. Dr. Cunningham noted that appellant was on total disability beginning April 19, 2014.

In a decision dated October 21, 2015, OWCP denied appellant's occupational disease claim because the evidence was insufficient to establish fact of injury. It determined that appellant did not provide sufficient details regarding the employment factors which she believed caused her condition. OWCP noted that appellant had not responded to questions regarding the employment-related activities appellant believed caused her condition, therefore the factual portion of her claim remained vague. It further found that the medical evidence failed to establish a diagnosed condition causally related to appellant's federal employment.

On November 18, 2015 OWCP received appellant's response to its development letter. Appellant described the employment-related activities which she believed contributed to her condition as walking down a ramp on cracked concrete with a cane, walking through the plant to the call center built in the back, and walking to her locker. She alleged that there were not enough handicap parking spaces in the employing establishment parking lot and therefore she had to walk 450 steps. Appellant reported that it took her approximately 20 minutes to walk slowly. She related that she did not have any hobbies or activities outside of federal employment. Appellant also pointed out that she had previously accepted claims for a right knee medial meniscus injury and a rotator cuff injury. She indicated that she did not experience any pain until January 2014 and after approximately six months, the pain worsened and she had to

see her orthopedic surgeon every three months. Appellant also noted that her left knee was being aggravated due to her right knee injury.

Appellant provided a right knee MRI scan report dated August 19, 2015 by Dr. Paresh Rijsinghani, a Board-certified diagnostic radiologist. Dr. Rijsinghani observed moderate medial and lateral compartment arthritic changes, grade III signal lateral meniscus tear within the anterior horn, and partial anterior cruciate ligament (ACL) tear.

On November 19, 2015 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative.

Appellant submitted a July 22, 2014 report by Dr. Cunningham. Dr. Cunningham indicated that a recent MRI scan of appellant's right knee showed osteoarthritic changes of the mediolateral and patellofemoral compartments, a lateral meniscus tear, and partial ACL tear. He reported that appellant was prevented from returning to her regular-duty job position because it required driving for an extended period of time. Dr. Cunningham noted that appellant could no longer live with her current symptoms and stumbled during her gait due to right knee pain. He provided examination findings and diagnosed right knee osteoarthritis, chondromalacia, medial and lateral meniscal tears, status post right shoulder rotator cuff repair, and status post left knee arthroscopy. Dr. Cunningham opined that the diagnoses "developed as a result of a work-related injury, which was previously described, that occurred on April 2, 2008." He further reported that appellant had "further exacerbations of this injury from more minor twisting, near falling episodes which occurred over this past winter at her most recent job site."

Appellant also resubmitted Dr. Cunningham's September 10, 2015 report.

On July 14, 2016 a telephone hearing was held. Counsel participated and noted that appellant had a previously accepted condition for a right knee meniscal tear in 2008. Appellant explained that when she returned to light duty at the call center, walking and tripping worsened her right knee problems. She indicated that she sought medical treatment from Dr. Cunningham and was advised that with the bone-on-bone problem, she needed a new knee. Appellant reported that in January 2014 she almost slipped on a bit of ice on the disability ramp while walking to work and caught herself from falling. She related that within seven months' time she slipped, tripped, and banged into a wall because work was very busy and she had to get back to her desk. Appellant further described that the walk to the call center inside the building was very long. She asserted that the walk was approximately the length of half a football field. Appellant also alleged that getting up to go on breaks, which they were required every two hours, going to the bathroom, and going to lunch also contributed to the deterioration of her right knee because she had to stand up and sit back down. She stated that she had not worked since April 2014 and was currently receiving social security disability benefits.

By decision dated September 27, 2016, an OWCP hearing representative affirmed OWCP's October 21, 2015 decision, finding that appellant had failed to establish fact of injury. She found that appellant failed to submit sufficient evidence to corroborate her account that she performed extensive walking in the workplace and that she had several episodes of twists and near falls at work. OWCP also determined that the medical evidence of record was insufficient to establish a worsening of appellant's right knee condition as a result of her employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence⁷ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁸ In an occupational disease claim, appellant's burden requires submission of the following: (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

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.¹⁰ There are two components involved in establishing the fact of injury. First, the employee must submit evidence sufficient to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.¹¹ Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.¹²

Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast doubt on an employee's statement in determining whether a *prima facie* case has been established.¹³

ANALYSIS

Appellant alleged that her right knee condition deteriorated as a result of repetitive walking and bending to sit as was required at work. OWCP denied her claim because she failed to establish fact of injury that she experienced the alleged employment factors. The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty.

⁶ *Supra* note 2.

⁷ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁸ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁹ *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁰ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

¹¹ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

¹² *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹³ *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

In her Form CA-2 and various statements, appellant described the factors of employment that she believed caused her right knee condition, including slipping on ice and snow in bad weather, tripping on carpet, getting her cane stuck on turn stile doors, walking to her desk, and walking to and from the bathroom and breakroom. She related an incident when a young man bumped into her and caused her to slam her right knee into a wall. Appellant alleged that she had medical restrictions from a 2008 injury which precluded the amount of walking she performed at work. She has alleged that the employing establishment parking lot did not contain enough handicap parking spots, which caused a longer walk. Appellant has also alleged that the employing establishment's toilet facilities did not provide enough handicap stalls, which resulted in additional bending of her knee.

Appellant's supervisor, A.S., however, was unable to corroborate appellant's account of her employment factors. In a September 18, 2015 letter, he reported that he had no knowledge of any of appellant's alleged near falls while walking into work and noted that she did not report any alleged near fall to him. A.S. explained that customer care agents were only required to perform sedentary work, such as entering information with a keyboard and mouse intermittently, and that appellant had not communicated any difficulty in performing her assigned duties. He also noted that appellant had never requested any accommodation.

The Board finds that the evidence of record does not contain any evidence to substantiate appellant's described employment factors of extensive walking, near-slips, trips, and knee bumping. Appellant has not provided any witness statements or occupational hazard documents to corroborate that these employment factors occurred. She has also not submitted probative evidence that her position as a customer care agent required extensive walking.¹⁴ There is no probative evidence of record to support that appellant walked extensively to the call center office or to and from the bathrooms and breakroom or had many near-slips or trips at work. Appellant has also noted in the submitted evidence that she was restricted walking at work from the parking lot to the call center, or restroom. However, she has not submitted any evidence to establish that the employing establishment lacked handicap parking spots or toilet facilities. The Board, therefore, finds that appellant has failed to substantiate the employment factors alleged.¹⁵

As appellant has not established the factual component of her claim, the Board will not address the medical evidence with respect to causal relationship.¹⁶

On appeal, counsel alleges that OWCP's decision was contrary to fact and law. His statement, however, does not provide any corroboration or clarification of the described employment factors that appellant believed attributed to her alleged right knee condition. Because appellant has not established the existence of any employment factors which she believed caused or aggravated her preexisting right knee condition, she has not met her burden of proof to establish her claim.

¹⁴ See A.S., Docket No. 16-0944 (issued November 2, 2016).

¹⁵ See B.J., Docket No. 14-1028 (issued September 17, 2014); M.H., Docket No. 07-1453 (issued October 18, 2007).

¹⁶ See B.G., Docket No. 16-1454 (issued November 22, 2016).

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. §§ 10.606 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 2017
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board