

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

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**D.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Brooksville, FL, Employer**

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**Docket No. 17-0538  
Issued: June 27, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 10, 2017 appellant, through counsel, filed a timely appeal from a November 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the November 7, 2016 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. Thus, it is precluded from reviewing this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

## ISSUE

The issue is whether appellant met her burden of proof to establish disability commencing October 29, 2015 due to the accepted August 26, 2013 employment injuries.

On appeal counsel argues that OWCP erred in denying her claim for wage-loss compensation.

## FACTUAL HISTORY

On September 6, 2013 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 26, 2013 she twisted her knee while stepping on a hickory nut when getting out of the postal vehicle while in the performance of duty. She had intermittent periods of disability until she stopped work on September 25, 2013.

OWCP accepted the claim for right knee lateral meniscus tear on October 29, 2013, authorized right knee arthroscopic surgery, which occurred on January 10, 2014, and paid appropriate wage-loss compensation.<sup>4</sup> On February 10, 2014 it expanded the acceptance of appellant's claim to include aggravation of right knee osteoarthritis.

Appellant returned to work on May 27, 2014 for four hours per day with restrictions. On December 19, 2014 OWCP approved a revision of the right knee joint and total right knee arthroplasty surgery, which occurred on February 5, 2015. Appellant returned to full duty on March 24, 2015.

In a November 23, 2015 report, Dr. Sara Vizcay, a treating Board-certified family physician, related that appellant had complained of right knee pain and swelling and stated that her recent right knee surgical intervention had been aggravated. Appellant's physical examination revealed right knee joint tenderness, swelling, crepitus, and positive valgus. Diagnoses included depression due to pain and employment injuries, right knee medial meniscal tear, and aggravation of postoperative knee replacement due to a new injury. Dr. Vizcay opined that appellant was currently disabled from working due to her multiple employment injuries.

In work capacity evaluation forms (Form OWCP-5c) dated November 17 and 23, 2015, Dr. Vizcay noted that appellant was unable to work at the present time and referenced her narrative report. She reported that appellant was being seen by an orthopedic physician for a possible right knee replacement and that she was currently totally disabled.

A nurse practitioner completed an OWCP-5c form on December 21, 2015 noting that appellant was currently totally disabled. She further noted that the medication appellant was prescribed decreased her attention span and increased sedation.

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<sup>4</sup> On December 8, 2014 OWCP granted appellant a schedule award for 10 percent permanent right leg impairment.

On December 31, 2015 OWCP received a claim for wage-loss compensation (Form CA-7) for the period October 29 to December 25, 2015.<sup>5</sup>

In a letter dated January 5, 2016, OWCP advised appellant of the evidence required to establish her claim for wage-loss compensation. It noted that the record showed that she stopped work on October 29, 2015 and had not returned. OWCP noted that she had also filed a new injury claim for an incident occurring on July 20, 2015. It advised appellant as to the medical and factual evidence required to establish that her disability on and after October 29, 2015 was due to the accepted August 26, 2013 employment injury. OWCP afforded appellant 30 days to provide the requested information.

On January 12, 2016 appellant submitted a Form CA-7 claiming wage-loss compensation for the period December 26, 2015 to January 8, 2016.

On February 25 and April 14, 2016 Dr. Viczay related that appellant was totally disabled in OWCP-5c forms. She noted appellant has severe right knee effusion and tendon tear.

By decision dated February 23, 2016, OWCP denied appellant's claim for wage-loss compensation for the period October 29, 2015 and continuing. It found her disability was due to a new injury which she sustained on July 20, 2015 when she slipped on a wet floor injuring her right knee.<sup>6</sup>

Following the February 23, 2016 decision denying her claim, appellant submitted a claim for wage-loss compensation (Form CA-7) for the period January 9 to April 15, 2016.

In a letter dated March 2, 2016, counsel requested a telephonic hearing before an OWCP hearing representative which was held on September 26, 2016.

Appellant retired from the employing establishment effective August 30, 2016.

On November 2, 2016 OWCP expanded acceptance of appellant's claim to include chronic pain syndrome.

By decision dated November 7, 2016, OWCP's hearing representative affirmed the February 23, 2016 decision. He noted that appellant's claim had been accepted for right lateral meniscal tear and subsequently expanded to include right leg/lower knee aggravation localized primary osteoarthritis. The hearing representative discussed factual and medical evidence from OWCP File No. xxxxxx219, in which appellant had filed a Form CA-1 alleging that she injured her knee when she slipped and fell on a wet floor on July 15, 2015.

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<sup>5</sup> Appellant had previously filed a claim for a recurrence of disability (Form CA-2a) beginning July 21, 2015. OWCP has not issued a decision on appellant's claim for a recurrence of disability.

<sup>6</sup> OWCP noted that appellant had filed a new injury claim which was assigned OWCP File No. xxxxxx219, but that claim had been denied.

## LEGAL PRECEDENT

An employee seeking benefits under FECA<sup>7</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>8</sup> For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.<sup>9</sup> Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>10</sup>

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>11</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>12</sup> An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>13</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.<sup>14</sup>

## ANALYSIS

Appellant’s claim was originally accepted for right knee lateral meniscus tear which was subsequently expanded to include aggravation of lower leg right knee osteoarthritis. She filed claims for wage-loss compensation on and after October 29, 2015 due to her accepted August 26, 2013 employment injury. By decision dated February 23, 2016, OWCP denied appellant’s claim for wage-loss compensation. On November 2, 2016 it expanded the acceptance of appellant’s

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<sup>7</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>8</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

<sup>9</sup> See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

<sup>10</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>11</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

<sup>12</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>13</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>14</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

claim to include chronic pain. By decision dated November 8, 2016, an OWCP hearing representative affirmed the denial of appellant's wage-loss claim.

The Board notes that the hearing representative referenced evidence from the claim for a July 20, 2015 knee injury under OWCP File No. xxxxxx219 due to a slip and fall. OWCP procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further indicates that the cases should be doubled as soon as the need to do so becomes apparent.<sup>15</sup> On remand, OWCP shall combine OWCP File No. xxxxxx219 with the current OWCP File No. xxxxxx448. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 7, 2016 is set aside and remanded for further proceedings consistent with this opinion.

Issued: June 27, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000). See *T.M.*, Docket Nos. 09-1090 & 09-2226 (issued March 8, 2010).