

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

B.C., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
RANDOLPH AIR FORCE BASE, TX, Employer**

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**Docket No. 17-0589
Issued: November 15, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant filed a timely appeal from a January 4, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish intermittent periods of total disability commencing June 1, 2016 as a result of the accepted April 5, 2013 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence following the January 4, 2017 decision. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On May 30, 2014 appellant, then a 48-year-old coal and rail equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on April 5, 2013 he twisted his left knee when he slipped on ice while on his way to turn on equipment at work. He stopped work and returned on April 6, 2014. OWCP accepted appellant's claim for left knee chondromalacia patellae.

Appellant stopped work again on January 25, 2016.³

Dr. Daniel R. Johnson, an osteopath specializing in orthopedic surgery, related in a February 29, 2016 report that appellant complained of left knee pain. He indicated that on April 5, 2013 appellant hyper-extended his left knee while at work. Dr. Johnson reviewed appellant's diagnostic testing results and conducted an examination of appellant's left knee. He reported diffuse tenderness over the patella and patellar tendon and tenderness to palpation along the medial aspect. Range of motion was full and strength was decreased. Dr. Johnson diagnosed ligamentous laxity of the knee, left knee pain, and derangement of the medial meniscus. He indicated that appellant "may do sit down job only at work." Dr. Johnson provided a duty status report, which related that appellant could return to work eight hours a day with restrictions of continuous sitting for eight hours and no standing, walking, climbing, kneeling, bending, stooping, twisting, pulling, pushing, or simple grasping.

Appellant submitted a February 2, 2016 letter by Edward Constantine, a human resources officer for the employing establishment. Mr. Constantine advised appellant that, due to a reduction-in-force (RIF) action, his position would be abolished and he would be reassigned to the position of coal and rail equipment operator effective April 4, 2016. Appellant also submitted a March 30, 2016 letter, which informed him that, due to personnel actions, his RIF had been cancelled.

In an April 20, 2016 e-mail, Rupert R. Smith, an Air Force Mission Support Officer, indicated that he was making a change to appellant's alternate work assignment due to Dr. Johnson's February 29, 2016 Form CA-17. He noted that appellant's office-type work would be changed to answering telephones and filling out and filing documents as assigned by himself or another supervisor. Mr. Smith explained that appellant would work 8 hours of his normal 10-hour shift performing the above-described office work. He indicated that the last two hours of appellant's shift would be put into "ATAAPS" as code for OWCP. Mr. Smith further informed appellant that he was authorizing him to use annual leave at his leisure.

³ On January 27, 2016 appellant filed a notice of recurrence claim (Form CA-2a) alleging that on January 25, 2016 he sustained a recurrence of disability causally related to the April 5, 2013 employment injury. He explained that over time his condition continued to degrade and the pain increased in both his knees. Appellant stopped work. He also filed a claim for wage-loss compensation (Form CA-7) for total disability for the period February 7 to March 5, 2016. In a decision dated May 11, 2016, OWCP denied appellant's claim for a recurrence on January 27, 2016 and for total disability from February 7 to March 5, 2016. It found that the evidence submitted was insufficient to establish that he was disabled from work due to a material worsening of his April 5, 2013 employment injury. Appellant's claims for recurrence of disability on January 27, 2016 and disability compensation from January 25 to March 5, 2016 are not currently before the Board.

Appellant received treatment from Samuel DeBlauw, a certified physician assistant. In a May 3, 2016 progress note, Mr. DeBlauw indicated that appellant complained of gastroesophageal reflux disease (GERD) and acid reflux that had worsened over the last two weeks and of pain with any motion of his knees. He reported that appellant did not think he should have to work due to his chronic knee pain. Mr. DeBlauw diagnosed GERD, chronic pain due to injury, and tear of the left knee meniscus. In a May 12, 2016 note, he and Robin T. Carter, a registered nurse, reported that appellant had worked “only [three] days in the past [three] weeks.” They related appellant’s complaints that: “I can’t work because of the pain.” Appellant also submitted progress notes by Mr. DeBlauw dated May 22 to December 15, 2015 for treatment for low back pain, right greater than left. He also provided drug testing results dated June 26, 2015.

In a May 31, 2016 progress note, Laura Catalano, a certified physician assistant, indicated that appellant was referred for anterior cruciate ligament repair and meniscus repair surgery. She reported that his original injury occurred in 2013 when he slipped on ice at work. Ms. Catalano noted that appellant wanted her to complete paperwork for workers’ compensation so that he did not have to go to work. Appellant informed her that Dr. Johnson did not listen to him when he told him that he was not able to sit for 10 hours. Ms. Catalano reviewed appellant’s history and diagnosed chronic left knee pain. She explained to him that she was unable to say that he could not sit at work. Ms. Catalano indicated that appellant would not be able to walk, squat, knee, or climb, but he should be able to sit at work. She provided a Form CA-17, which indicated that he could work with restrictions of sitting for 10 hours.

Appellant submitted physical therapy notes dated May 9 to June 2, 2016.

On June 24, 2016 appellant underwent various diagnostic tests. In a June 24, 2016 left knee magnetic resonance imaging (MRI) scan report, Dr. Leslie R. Bryant, a Board-certified diagnostic radiologist, diagnosed moderate medial compartment joint space narrowing. He indicated that appellant’s condition had progressed from his previous MRI scan. In a June 24, 2016 left knee x-ray examination, Dr. Max Walker, a Board-certified diagnostic radiologist, noted mild degenerative changes.

In a June 24, 2016 report, Dr. Eric Kian Bee Lim, a Board-certified orthopedic surgeon, indicated that appellant injured his left knee in April 2013 when he slipped on some ice at work. He noted that appellant had a history of a left knee arthroscopy in 2010. Dr. Lim indicated that appellant complained of a combination of aching and sharp pain with associated instability since the original injury. He reported that appellant was previously cleared for a desk/sitting job, but appellant stated that he could not do it. Dr. Lim reviewed appellant’s history and provided physical examination findings. He reported no swelling of the left knee and global pain throughout to palpation. Dr. Lim indicated global pain to McMurray’s testing. Range of motion was 0 to 130 degrees. Dr. Lim diagnosed mild-to-moderate degenerative changes in the medial compartment of appellant’s left knee and associated recurrent medial meniscus tear. He recommended no surgery and that appellant should continue conservative measures. Dr. Lim reported that he did not see a physical reason why appellant could not perform his current job description.

Appellant was treated by Nathaniel D. Grimes, a community health aide, and Dr. Deborah J. Minnick-Sheridan, an osteopath specializing in family medicine. In a June 27, 2016 progress note, Dr. Minnick-Sheridan related complaints of bilateral knee pain for the last three years due to injury. She related that appellant was walking on snow when he slipped on a patch of ice, his left leg went straight out to the side, and he heard a very loud pop. Upon physical examination, Dr. Minnick-Sheridan observed no tenderness in the femur or knee to palpation, no crepitus, no swelling, and no deformities. She reported pain in the sides of hips and just below the patella with active and passive range of motion. Dr. Minnick-Sheridan recommended continued physical therapy.

Mr. DeBlauw continued to treat appellant. In progress notes dated June 28 to July 19, 2016, he related appellant's complaints of muscle tightness in the bilateral lower back radiating to the hips, continued left knee pain, and GERD. Examination of appellant's back showed midline tenderness of the spine and negative straight leg raise testing. Examination of the lower extremities revealed 5/5 motor examination bilaterally and positive deep tendon reflexes. Mr. DeBlauw diagnosed tear of the left knee meniscus, essential hypertension, GERD without esophagitis, and back muscle spasms.

In a September 29, 2016 Form CA-17, Mr. DeBlauw noted a diagnosis of left knee meniscus tear. He indicated that appellant was able to resume work with restrictions of sitting for 10 hours and standing, bending, stooping, twisting, and reaching above the shoulder for 2 hours.

Mr. Smith provided an October 12, 2016 memorandum, in which he indicated that appellant's alternate work assignment was "nonproductive work." He explained his reasons for coming to this conclusion and requested that the Civilian Personnel Office address appellant's situation because the employing establishment had "no productive and meaningful work" for appellant.

On November 14, 2016 appellant submitted a Leave Buy Back Worksheet Certification and Election form for the period August 25 to October 25, 2016. He noted a date of injury of April 5, 2013 and indicated that he stopped work on August 25, 2016.

On November 22, 2016 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) during the period June 1 to November 12, 2016. In various time analysis forms (Forms CA-7a), he requested 10 hours of compensation on each of the following dates: June 7, 8, 9, 13, 14, 15, 16, 20, 21, 22, 23, 27 and 28, 2016; July 5, 11 and 19, 2016; August 8, 24 and 25, 2016; September 6, 7, 12, 19, 20, 21 and 22, 2016; October 20, 26, 27 and 31, 2016; and November 1, 2, 3, 7, 8, 9 and 10, 2016. Appellant also requested eight hours on July 13, 2016; seven hours on August 23 and October 3 and 19, 2016; six hours on July 25 and September 29, 2016; five hours on October 6, 2016; four hours on August 4, 2016; three hours on July 26 and 28, 2016; two hours on June 29, 2016; and one hour on June 6 and October 17, 2016. He indicated that his reason for using leave was "restrictions." Appellant also provided another Form CA-7a, which indicated that his reason for leave use was "employer had nothing for me to do within my restrictions."

Appellant submitted another time analysis form (Form 7a), which requested 10 hours of leave on each of the following dates: August 25, September 29, and October 25, 2016. He indicated that his reason for leave was “general illness due to pain management treatment.”

On November 30, 2016 OWCP received a Form CA-7 from appellant requesting disability compensation for the period November 13 to 26, 2016.

By letter dated December 1, 2016, OWCP informed appellant that it received his claims for intermittent disability compensation, effective June 1, 2016 and continuing. It advised him that the evidence of record was insufficient to support his claim and requested additional evidence to establish a material worsening of his condition to the extent that he was unable to work on the claimed dates.

Appellant submitted an October 21, 2016 medical record by Mr. DeBlauw who noted that appellant was seen for workers’ compensation paperwork. Mr. DeBlauw indicated that appellant needed to be seen monthly. He conducted an examination and noted no changes in appellant’s previous condition. Mr. DeBlauw diagnosed tear of the left knee meniscus.

In a December 20, 2016 letter, Jake Malouf, a registered nurse, reported that appellant was seen in their clinic on December 6, 2016. He noted that he was attaching an attending physician’s report (Form CA-20) and Form CA-17.

Appellant submitted a December 19, 2016 Form CA-20 by Dr. Jason Capo, a Board-certified orthopedic surgeon. Dr. Capo related that appellant injured his knee at work more than five years ago and experienced swelling and instability. He noted that appellant had a history of arthritis. Dr. Capo reported examination findings and a diagnosis of bilateral medial compartment arthritis -- all on the left. He reported “unknown” regarding whether appellant’s condition was caused or aggravated by his employment activity. Dr. Capo indicated that appellant was partially disabled beginning April 1, 2013. He noted that appellant could resume light work with restrictions of not standing, walking, or climbing for an extended period of time. Dr. Capo also provided a Form CA-17 with appellant’s work restrictions. Appellant also resubmitted the June 24, 2016 diagnostic testing results.

By decision dated January 4, 2017, OWCP denied appellant’s claims for intermittent disability compensation beginning June 1, 2016, finding that the medical evidence of record failed to establish that he was totally disabled from work on the claimed dates as a result of his accepted April 5, 2013 employment injury. It further determined that the medical evidence did not provide objective or clinical findings that showed a worsening of his accepted condition to support that he was unable to work on the claimed dates.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for

⁴ *Supra* note 1.

which compensation is claimed is causally related to the employment injury.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

Whether a particular injury causes an employee to be disabled from 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 Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.⁸ When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she was in too much pain to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁹

For each period of disability claimed, the employee must establish that he or she was disabled from work as a result of the accepted employment injury. The Board will not require OWCP to pay compensation for disability in the absence of any 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 his or her disability and entitlement to compensation.¹⁰

ANALYSIS

OWCP accepted that on April 5, 2013 appellant twisted his left knee when he slipped on ice while on his way to turn on equipment at work. It accepted his claim for left knee chondromalacia patellae. On November 22, 2016 appellant filed a claim for intermittent wage-loss compensation for the period June 1 to November 12, 2016. In a January 4, 2017 decision, OWCP denied his claim for disability compensation for intermittent dates beginning June 1, 2016 because the medical evidence of record was insufficient to establish total disability on the specific dates claimed. The Board finds that appellant has failed to establish that he was disabled on intermittent dates beginning June 1, 2016 as a result of the accepted April 5, 2013 employment injury.

The Board notes that the evidence of record substantiates that on January 25, 2016 appellant stopped work. The evidence of record further reveals that on February 29, 2016

⁵ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury, but no loss of wage-earning capacity).

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁸ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Amelia S. Jefferson*, *supra* note 7.

Dr. Johnson restricted appellant to sedentary work duties to eight hours. In March 2016, appellant was offered an alternate work assignment performing sedentary, office work.

During the period of disability claimed, appellant received medical treatment from Dr. Lim. In a June 24, 2016 report, Dr. Lim related that in April 2013 appellant sustained a left knee injury at work and continued to complain of pain and associated instability. He noted that appellant was cleared for a sedentary desk job, but appellant believed that he could no longer work. Upon physical examination, Dr. Lim observed pain throughout appellant's left knee to palpation, but no swelling. He diagnosed mild-to-moderate degenerative changes in the medial compartment of appellant's left knee and associated recurrent medial meniscus tear. Dr. Lim reported that he did not see a physical reason why appellant could not perform his current job description. The Board finds that his report is insufficient to establish appellant's claim for intermittent disability beginning June 1, 2016 as he did not relate that appellant was totally disabled from work on any of his claimed dates of disability. On the contrary, Dr. Lim determined that appellant could in fact perform his current sedentary job position. It is not enough for a physician to simply confirm that appellant reported being unable to work on certain dates. This would allow an employee to self-certify his or her disability.¹¹

Likewise, Dr. Capo also indicated in his December 19, 2016 Form CA-20 that appellant was partially disabled beginning April 1, 2013 and could resume light work with restrictions of not standing, walking, or climbing for an extended period of time. As neither Dr. Lim, nor Dr. Capo provided an opinion that appellant was totally disabled from work, their reports are insufficient to establish that appellant was totally disabled on the specific dates claimed beginning June 1, 2016 due to the accepted April 5, 2013 employment injury.¹²

The Board further notes that Dr. Lim provided a diagnosis of left knee degenerative changes and medial meniscus tear and Dr. Capo noted a diagnosis of bilateral knee medial compartment arthritis. None of these conditions, however, have been accepted by OWCP as causally related to the April 5, 2013 employment injury. For conditions not accepted by OWCP as being employment related, it is the employee's burden of proof to provide rationalized medical evidence sufficient to establish causal relationship, not OWCP's burden of proof to disprove such relationship.¹³

In a June 27, 2016 progress note, Dr. Minnick-Sheridan accurately described the April 5, 2013 employment injury and noted appellant's complaints of knee pain for the past three years. She provided examination findings and recommended continued physical therapy. Dr. Minnick-Sheridan, however, did not offer an opinion on appellant's inability to work. The Board has found that medical evidence which does not offer any opinion regarding the cause of disability is of limited probative value on that issue.¹⁴

¹¹ *A.J.*, Docket No. 10-2407 (issued July 25, 2011).

¹² *See M.C.*, Docket No. 16-1238 (issued January 26, 2017).

¹³ *G.A.*, Docket No. 09-1253 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁴ *J.H.*, Docket No. 15-1877 (issued May 3, 2016); *Michael E. Smith*, 50 ECAB 313 (1999).

Likewise, Dr. Bryan's June 24, 2016 left knee MRI scan report and Dr. Walker's left knee x-ray examination report also failed to address appellant's inability to work on the claimed dates. Because these physicians failed to address the issue of intermittent disability on specific dates beginning June 1, 2016, their reports are insufficient to establish appellant's disability claim.¹⁵

Appellant also received treatment from Mr. DeBlauw, a certified physician assistant who provided various progress notes dated May 12 to October 21, 2016. These reports are of no probative value, however, because physician assistants are not considered physicians as defined under FECA.¹⁶

The Board notes that appellant submitted another Form CA-7a and indicated that his reason for leave use was "employer had nothing for me to do within my restrictions." Appellant submitted an October 12, 2016 memorandum by Mr. Smith who requested that the Civilian Personnel Office address appellant's alternate work assignment because the employing establishment no longer found his assignment productive and meaningful. The Board finds, however, that the evidence of record does not establish that a modified-duty job was withdrawn or that the employing establishment was unable to accommodate his restrictions. The Board notes that the October 12, 2016 memorandum did not formally withdraw appellant's alternate work assignment. It merely brought up the employing establishment's concerns about appellant's work assignment and requested that the Civilian Personnel Office address these concerns.¹⁷

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. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish intermittent periods of total disability commencing June 1, 2016 as a result of the accepted April 5, 2013 employment injury.

¹⁵ *Supra* note 11.

¹⁶ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

¹⁷ If appellant were receiving medical treatment for his accepted left knee condition he could be paid wage-loss compensation medical services and reasonable time spent traveling to and from the medical provider's location. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998); see also *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2017
Washington, DC

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

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

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