United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 17-0887**
	)	**Issued: October 13, 2017**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Jacksonville, FL, Employer	)	

Appearances:
Appellant, pro se
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 March 15, 2017 appellant filed a timely appeal from an October 28, 2016 merit decision and a January 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for a review of the written record as untimely filed; and (2) whether appellant has met his burden of proof to establish a left knee condition causally related to factors of his federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 18, 2016 appellant, then a 52-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he injured his left knee performing his employment duties of bending, lifting, and turning. He noted that he had an earlier similar right knee injury which required surgery[2] and that, in an effort to protect his right knee, he injured his left knee. Appellant first became aware of his condition on November 26, 2015 and first attributed the condition to his employment on that date.

In support of his claim, appellant submitted a July 13, 2016 duty status report (Form CA-17) from Dr. Rahul V. Deshmukla, a Board-certified orthopedic surgeon, diagnosing meniscal tear and providing work restrictions. Dr. Deshmukla completed an attending physician's report (Form CA-20) on July 14, 2016 and diagnosed tear of the medial meniscus of the left knee. He listed appellant's history as "injury/pain to the [left] knee while [at] work." Dr. Deshmukla checked a box marked "yes" to indicate that the condition was caused or aggravated by an employment activity. He provided work restrictions and recommended surgery.

On August 9, 2016 OWCP requested additional factual and medical evidence from appellant in support of his occupational disease claim. It afforded him 30 days to respond.

Medical evidence provided by appellant included a December 28, 2015 magnetic resonance imaging (MRI) scan of the left knee which showed a mild partial tear of the posterior meniscal root and degeneration of the posterior horn. An August 10, 2016 work capacity evaluation (OWCP-5c) from a physician assistant was submitted.

Dr. Deshmukla examined appellant on July 13, 2016 due to left knee pain. He noted that appellant denied any acute injury or trauma, but that his pain was aggravated by climbing and descending stairs, walking, and standing. Appellant attributed his knee condition to overuse at work. Dr. Deshmukla opined, "52[-]year-old [appellant] with progressive left knee pain due to overcompensation for right knee work injury. He also has worsened left knee pain and instability with evidence of medial meniscal tearing."

On August 10, 2016 Dr. Kevin Peterson, a Board-certified family practitioner, reported examining appellant due to right knee pain. He noted that appellant experienced more right knee pain after injuring his left knee. Appellant had undergone right knee surgery on January 5, 2010 due to medial meniscus tear and chondromalacia patella. Dr. Peterson reported that appellant had progressive left knee pain due to overcompensation for right knee work injury as well as left knee instability with evidence of medial meniscal tearing.

Appellant accepted a modified-duty assignment from the employing establishment on August 14, 2016.

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[2] OWCP had earlier accepted a right meniscal tear under OWCP File No. xxxxxx029 with a date of injury of August 11, 2007. This claim is not before the Board on the present appeal.

Dr. Deshmukla completed a duty status report (Form CA-17) on August 25, 2016 and indicated that appellant could not climb, kneel, or twist. On September 6, 2016 he diagnosed progressive left knee pain due to overcompensating for the right knee work injury. Dr. Deshmukla noted that appellant's left knee MRI scan dated December 28, 2015 confirmed meniscal tearing. He continued submitting status reports noting appellant's work restrictions.

Appellant had a right knee MRI scan on September 16, 2016 which revealed degeneration of the medial meniscus and a parameniscal cyst. He also demonstrated altered patellofemoral tracking of the right knee and a large full-thickness chondral defect.

Appellant responded to OWCP's request for factual information on September 16, 2016. He asserted that he developed progressive left knee pain due to overcompensating for the work-related right knee condition. Appellant attributed his left knee condition to working on a concrete floor, as well as standing, twisting, and bending for two to four hours during a work night. He noted that he was required to lift and carry up to 70 pounds. Appellant concluded that "sudden turns, twisting, bending, and lifting and the workroom hard concreted floors" contributed to his left knee condition.

On January 25 and September 16, 2016 Dr. Luis F. Anez, a Board-certified family practitioner, examined appellant due to left knee pain and acute meniscal tear of the left knee. He noted that appellant's MRI scan demonstrated meniscal tear and degeneration and that appellant had undergone right knee surgery. Dr. Anez indicated that appellant sought medical evidence that substantiated that his left meniscus tear was caused or aggravated by work. He opined that appellant tore his meniscus on November 26, 2015, that his back had been hurting for more than 20 years, and that his left knee buckled when he walked. Dr. Anez noted that appellant attributed his left knee condition to overcompensation for his prior right knee injury.

By decision dated October 28, 2016, OWCP denied appellant's occupational disease claim finding that he had not established a causal relationship between his left knee meniscal tear and his job duties.

Appellant requested a review of the written record of OWCP's October 28, 2016 decision from OWCP's Branch of Hearings and Review in an appeal request form report dated November 28, 2016 and postmarked November 29, 2016. By decision dated January 19, 2017, the Branch of Hearings and Review denied his request for review of the written record as untimely filed. It further exercised its discretion and found that the issue could equally well be addressed by requesting reconsideration and submitting medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) of FECA concerning a claimant's entitlement to a hearing before an OWCP representative, indicates: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3] Section 10.615 of OWCP's regulations implementing this section of FECA

[3] 5 U.S.C. § 8124(b)(1).

provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[4] OWCP regulations provide that the request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a review of the written record is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[5]

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA,[6] has the power to hold hearings and reviews of the written record in certain circumstances where no legal provision was made for such reviews and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing or review of the written record.[7] OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[8]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined appellant's request for a review of the written record, postmarked on November 29, 2016, was not timely filed as it was made more than 30 days after the issuance of the OWCP's October 28, 2016 decision. OWCP, therefore, properly denied his hearing as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a review of the written record in this case. It determined that this was not necessary as the issue in the case could be addressed through the submission of new evidence in the reconsideration process. Therefore, OWCP properly denied appellant's request for review of the written record as untimely filed and properly exercised its discretion in determining to deny his request for review of the written record as he had other appeal options available.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[9] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of FECA and 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

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[4] 20 C.F.R. § 10.615.

[5] *Id*. at § 616(a).

[6] *Supra* note 1.

[7] *Marilyn F. Wilson,* 52 ECAB 347 (2001).

[8] *Daniel J. Perea,* 42 ECAB 214, 221 (1990).

[9] *Supra* note 1.

disability or specific condition for which compensation is claimed is causally related to the employment injury.[10]

OWCP's regulations define an occupational disease as "a condition produced by the work environment over a period longer than a single workday or shift."[11] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

A medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.[12] Medical rationale includes a physician's detailed opinion on the issue of whether these is a causal relationship between the claimant's diagnosed condition and the implicated employment activity. The opinion of the physician must be based on a complete factual and medical background of the claim, 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 specific employment activity or factors identified by the claimant.[13]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish a causal relationship between his diagnosed left knee condition and his federal job duties.

In support of his claim for an occupational disease, appellant submitted a series of reports from Dr. Deshmukla diagnosing meniscal tear of the left knee. On July 14, 2016 Dr. Deshmukla indicated that appellant experienced pain in his knee at work and checked a box marked "yes" to indicate that he believed that appellant's left knee condition was caused or aggravated by an employment activity. The Board has held that an opinion on causal relationship which consists only of a physician checking the box "yes" in answer to a medical form report question of whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[14]

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[10] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[11] 20 C.F.R. § 10.5(q).

[12] *T.F.,* 58 ECAB 128 (2006).

[13] *A.D.*, 58 ECAB 149 (2006).

[14] *Lucrecia M. Nielson,* 41 ECAB 583, 594 (1991).

On July 13 and September 6, 2016 Dr. Deshmukla opined that appellant's progressive left knee pain was due to overcompensation for right knee work injury. A mere conclusion, without the necessary rationale explaining how and why he believes that appellant sustained his left knee condition, is insufficient to meet appellant's burden of proof.[15] Other reports from Dr. Deshmukla are of limited probative value as they did not specifically address whether appellant's diagnosed condition was causally related to employment factors.[16]

Dr. Peterson examined appellant on August 10, 2016, he opined that appellant had progressive left knee pain due to overcompensation for right knee work injury as well as left knee instability with evidence of medial meniscal tearing. This report is also insufficient to meet appellant's burden of proof as Dr. Peterson did not explain how and why appellant's left torn medial meniscus was caused or contributed to by his work.[17]

On January 25 and September 16, 2016 Dr. Anez diagnosed acute meniscal tear of the left knee. He opined that appellant tore his meniscus on November 26, 2015. Dr. Anez suggests that appellant sustained an injury on a specific date rather than developing his torn meniscus over a period of time longer than a work shift. This opinion supporting a traumatic injury is not consistent with appellant's claim for an occupational disease.[18] Dr. Anez also noted that appellant attributed his left knee to overcompensation for his prior right knee injury. An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[19]

Appellant also submitted a note dated August 10, 2016 from a physician assistant. However, this report is of no probative value. FECA provides that a physician includes: surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law.[20] Healthcare providers such as licensed clinical social workers, nurses, acupuncturists, physician assistants, and physical therapists are not considered physicians under FECA and their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability, or causal relationship.[21]

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[15] *D.R.,* Docket No. 16-0528 (issued August 24, 2016).

[16] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[17] *Supra* note 15.

[18] *Supra* note 11; *supra* note 15.

[19] *R.W.,* Docket No. 15-0345 (issued September 20, 2016); *Robert A. Boyle*, 54 ECAB 381 (2003).

[20] 5 U.S.C. § 8101(2).

[21] *T.R.,* Docket No. 17-0239 (issued April 12, 2017); *V.C.,* Docket No. 16-0642 (issued April 19, 2016); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawckuk,* 57 ECAB 316, 320 n.11 (2006); *Allen C. Hundley,* 53 ECAB 551 (2002). *See also G.G.,* 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White,* 34 ECAB 515 (1983).

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.[22]

CONCLUSION

The Board finds that OWCP's Branch of Hearings and Review properly denied appellant's request for a review of the written record as the request was untimely filed. The Board further finds that he had not met his burden of proof to establish a left knee condition causally related to factors of his federal employment.

ORDER

IT IS HEREBY ORDERED THAT January 19, 2017 and October 28, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 13, 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

[22] Once the primary injury is causally connected with the employment, a subsequent injury whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. *See S.L.,* Docket No. 14-1250 (issued December 2, 2015). If appellant believes that he has developed a consequential injury from prior work injury, he may file an appropriate claim with OWCP under the other claim file.