

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

C.R., Appellant)	
)	
and)	Docket No. 17-0648
)	Issued: August 15, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Columbus, OH, Employer)	
)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 1, 2017 appellant, through counsel, filed a timely appeal from a January 10, 2017 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.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability commencing October 29, 2013 causally related to her accepted July 16, 2013 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts follow.

On January 3, 2014 OWCP accepted that appellant, then a 53-year-old city letter carrier, sustained right knee contusion, right knee sprain, right elbow contusion, and right elbow strain when she fell due to syncope while delivering mail on July 16, 2013.⁴ Appellant stopped work on October 29, 2013.

Appellant subsequently submitted a December 31, 2013 attending physician's report (Form CA-20) from Dr. Charles May, an osteopath and family practitioner. Dr. May advised that the history of injury included that her right leg gave out and she fell hitting her right knee and right elbow and noted that appellant had a preexisting history of "2009 work injury to [her right] knee." He provided findings and diagnosed: right knee sprain and contusion; right elbow sprain and contusion; and aggravation of degenerative joint disease of the right knee. Dr. May checked the box marked "yes" in response to whether he believed the condition was caused or aggravated by appellant's employment activity. He also noted that appellant was totally disabled from work for the period October 29, 2013 to March 31, 2014.

On January 8, 2014 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation for disability from October 19 to December 27, 2013. However, the attached time analysis form (Form CA-7a) indicated that appellant was not claiming compensation until October 29, 2013, the date that she stopped work completely.

By development letter dated January 17, 2014, OWCP noted that appellant was claiming compensation effective October 19, 2013 and continuing and that she had stopped work on October 29, 2013 and had not returned. It also indicated that it appeared that appellant was claiming a disability due to a material change or worsening of her accepted work-related conditions. OWCP therefore provided the definition of a recurrence. It explained that to be entitled to compensation for wage loss as a result of her current disability, she must provide factual and medical evidence to substantiate the recurrent disability. OWCP noted the present evidence did not substantiate disability for the requested period and requested that appellant submit medical evidence to establish that she was disabled for work during the entire period claimed. It found that there was not a physician's opinion supported by objective findings as to the relationship between

³ *Order Remanding Case*, Docket No. 15-0737 (issued August 3, 2015).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx096. Appellant has a prior traumatic injury claim of February 25, 2009 which OWCP accepted for lumbar sprain, bilateral knee sprains and contusions. It assigned OWCP File No. xxxxxx601. OWCP File Nos. xxxxxx096 and xxxxxx601 have been administratively combined, with OWCP File No. xxxxxx096 serving as the master file.

her disability and the original injury and or illness. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant continued to submit Form CA-7 claims for wage-loss compensation for continuing disability.

OWCP subsequently received a series of additional reports from Dr. May. In a January 29, 2014 attending physician's report, Dr. May explained that appellant's right lower extremity gave out, and she fell, hitting her right knee and right elbow. He indicated that there was evidence of concurrent or preexisting history of a "2009 work injury to [appellant's right] knee." Dr. May provided findings and diagnosed right knee sprain strain and right elbow strain and sprain. He checked the box marked "yes" in response to whether he believed that appellant's conditions were caused or aggravated by her employment activity. Dr. May advised that the period of disability ran from October 29, 2013 to April 29, 2014.

A January 29, 2014 duty status report (Form CA-17) from Dr. May noted various physical restrictions due to appellant's accepted conditions, but when asked whether she was advised to resume work, he checked the box marked "no."

In a report dated February 4, 2014, Dr. May noted that appellant had difficulty walking, standing, or climbing stairs because of her worsening right knee pain and worsening right hip pain. He opined that "[i]n my medical opinion, appellant has been unable to work all the duties of her job as a postal carrier since we first examined her on October 29, 2013. He opined that she had difficulty standing, walking, and climbing mainly because of her right knee injury which has yet to be fully diagnosed."

By decision dated February 26, 2014, OWCP denied appellant's claim for compensation for the period October 19, 2013 and continuing because the evidence of record was insufficient to establish that she was totally disabled from work due to her accepted work-related conditions. It explained that the evidence submitted did not establish that she had a return or increase of disability due to a change or worsening of her accepted work-related conditions because it did not contain a well-rationalized physician's opinion supported by objective findings as to the relationship between her claimed disability and her original work injury. OWCP found that appellant did initially not stop work following the July 16, 2013 employment injury. Rather, appellant continued to work the regular duties of her job until she stopped work on October 29, 2013. OWCP explained that while Dr. May advised in his February 4, 2014 report that she was unable to perform all of the duties of her position, he did not support total disability from all work. It explained that an opinion was needed from a treating physician explaining why and how the work injury prevented her from all work, especially given that she was working without apparent difficulty from July 17 to October 19, 2013, ultimately stopping work on October 29, 2013.

OWCP subsequently received a February 25, 2014 report wherein Dr. May advised that, since his last report of February 4, 2014, a magnetic resonance imaging (MRI) scan of appellant's right knee was obtained. Dr. May explained that the scan revealed tricompartmental degenerative joint disease of the right knee as well as a tear of both medial and lateral menisci of the right knee. He advised that these findings were certainly consistent with appellant's complaints and physical findings. Dr. May opined that appellant substantially aggravated her preexisting tricompartmental

degenerative joint disease of the right knee as a direct and proximate result of her work injury occurring on July 16, 2013. He also opined that appellant developed a medial and lateral meniscal tear as a direct and proximate result of her July 16, 2013 work injury.

On March 6, 2014 appellant requested a telephonic hearing, which was held before an OWCP hearing representative on September 9, 2014. She also continued to submit additional Form CA-7 claims for compensation.

In a March 10, 2014 report, Dr. May advised that he reexamined appellant on March 10, 2014. He related that appellant complained of worsening right knee pain and advised that she did not have much mobility. Dr. May recommended an evaluation by an orthopedic specialist.

In a March 24, 2014 report, Dr. Jeremy R. Mathis, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment and conducted an examination. He diagnosed degenerative joint disease of the right knee. Dr. Mathis provided several options for appellant's ongoing knee condition. He noted that appellant wanted to consider right knee arthroplasty. Dr. Mathis advised that this would be appropriate for her findings and indicated that he would submit a request for authorization for a total knee arthroplasty.⁵

In a May 12, 2014 report, Dr. Mark E. Gittins, a Board-certified orthopedic surgeon and osteopath, noted appellant's history of injury and treatment. He diagnosed right knee pain, osteoarthritis of the right knee, medial and lateral meniscal tears, elevated body mass index, and tobacco abuse. Dr. Gittins explained that they discussed various treatment options with her, both operative and nonoperative. He noted that appellant wished to proceed with the right total knee arthroplasty.

In a September 10, 2014 report, Dr. May noted appellant's history of injury and treatment and addressed her claim for continuing disability commencing October 19, 2013. He explained that following her employment injury they were unable to proceed with treatment for her because her claim had not been adjudicated. Dr. May also explained that on January 21, 2014 they were notified that appellant's claim was finally allowed. He indicated that at that point, they proceeded with some therapy for her knee and she did not improve. Dr. May noted that she then saw the orthopedic specialist who wanted to perform a total right knee arthroplasty. He opined that because of her right knee injury, appellant was unable to work from the date that he first saw her on October 29, 2013 and she remained disabled from her job as a letter carrier for the employing establishment as a result of this injury until more definitive treatment was approved and completed. Dr. May explained that, with the pathology in her right knee, it was obvious that she could not perform the duties required of a letter carrier.

⁵ OWCP also received his March 24, 2014 notes.

By decision dated November 25, 2014, OWCP's hearing representative affirmed the February 26, 2014 decision.⁶

OWCP subsequently received an April 18, 2015 attending physician's report, wherein Dr. May advised that the history of injury included that appellant's right leg gave out and she fell while working. Dr. May noted that she had fallen on her right knee and her right elbow on July 16, 2013. He noted that the date of his first examination was October 29, 2013 and that appellant continued to receive treatment to the present. Dr. May advised that appellant was totally disabled from work commencing November 29, 2014.⁷

In reports dated May 27 and June 8, 2015, Dr. May opined that appellant had reached maximum medical improvement and noted that she could return to work effective that date with several physical restrictions.

On June 15, 2015 the employing establishment provided appellant with an offer of modified assignment (limited duty) as a city carrier. Appellant accepted that offer on June 15, 2015.

In a June 30, 2015 duty status report, Dr. May noted that appellant was currently working and had continued right knee pain and that her knee throbbed at night after working. He related that she indicated that she was taking more nonsteroids because of her pain and throbbing, but denied any specific injury to right knee. By decision dated September 22, 2015, OWCP issued a *de novo* decision denying appellant's claim for compensation commencing October 19, 2013. It found that she had not submitted rationalized medical evidence sufficient to establish that the claimed disability was causally related to her accepted work-related condition.

On September 28, 2015 counsel requested a telephonic hearing, which was held on May 19, 2016.

During the hearing, appellant indicated that she was off work from October 2013 through June 2015. She explained that she then returned to work with limitations. Appellant noted that she stopped work after a new injury to a different part of the body in January 2016. She advised that she underwent a total knee replacement in October 2014. Appellant stated that she worked from the injury in July 2013 until she stopped work in October 2013, and that her symptoms kept her from continuing to work. She explained that the employing establishment was pressuring her because she was not keeping up with her time.

By decision dated August 2, 2016, OWCP's hearing representative affirmed the September 22, 2015 decision. She found that appellant had not established that her claimed

⁶ Appellant appealed the hearing representative's decision to the Board. By decision dated August 3, 2015, the Board set aside the November 25, 2014 decision and remanded the case, for OWCP to administratively combine File Nos. xxxxxx096 and xxxxxx601 to be followed by an appropriate merit decision. OWCP administratively combined the files on August 14, 2015, with File No. xxxxxx096 serving as the master file.

⁷ The Board notes that this appears to have been a typographical error as the record reflects that appellant stopped work on October 29, 2013.

disability was causally related to her accepted knee condition. The hearing representative noted that she had delayed seeking medical treatment and that she did not stop work until October 29, 2013. She also noted that appellant had a preexisting claim for which she had actively sought treatment for both knees. The hearing representative concluded that none of the medical records submitted supported an ongoing period of disability commencing October 29, 2013 as they were either speculative or failed to provide a rationalized opinion supporting the claimed disability.

OWCP subsequently received a series of medical reports dated October 18, 2016 in which Dr. May noted that appellant's leg gave out and she fell hitting her right knee and elbow. Dr. May explained that appellant was first seen on October 29, 2013 and she was rendered totally disabled from work for the period November 29, 2014 to June 8, 2015.⁸ In an October 18, 2016 Form CA-17 duty status report, he advised that appellant was advised to resume work as of June 8, 2015 with restrictions.

On November 16, 2016 appellant, through counsel, requested reconsideration and submitted new medical evidence.

In a November 1, 2016 report, Dr. May explained that appellant was a patient for several years, but due to financial matters he stopped seeing her in 2009. He advised that he again began seeing appellant in 2013 in relation to a work injury to the right knee which occurred on July 16, 2013. Dr. May also noted that in 2009 appellant saw Dr. Joseph Wilcox, a Board-certified orthopedic surgeon. He advised that appellant received steroid injections. Dr. May advised that in a follow-up examination by Dr. Wilcox on August 12, 2013, Dr. Wilcox recommended a return to work without restriction. Dr. May explained that these treatment notes were important because they revealed that appellant received treatment following the injury. He noted that this was in contrast to OWCP's finding that appellant did not receive any treatment after the July 2013 injury. Dr. May opined that appellant was having problems with both knees and received a steroid injection five days before the injury with an excellent result. He further explained that, although appellant had an intervening injury on July 16, 2013, the injection helped her right knee which remained fairly asymptomatic until she saw him on October 29, 2013. By the time Dr. May saw appellant on October 29, 2013, the effects of the injection had worn off and appellant was suffering from pain in the right knee. He found that the right knee was much worse in October 2013 compared to the initial evaluation five days prior to the injury. Dr. May posited that the preexisting degenerative joint disease was aggravated by the fall on July 16, 2013. He opined that the right knee became worse following the July 16, 2013 work injury and had progressed to the point that appellant needed to undergo a total knee arthroplasty. Dr. May noted that this was proof that the work injury aggravated the preexisting arthritis. He opined that appellant's disability was a direct result of the July 16, 2013 work injury.

OWCP received July 11, 2013 treatment notes from a physician assistant, who indicated that appellant was seen for complaints of bilateral knee pain and diagnosed symptomatic degenerative joint disease. The physician assistant recommended cortisone injections to the bilateral knees and noted that she tolerated the procedure well without complications.

⁸ *Id.*

In August 12, 2013 treatment notes, Dr. Wilcox noted that appellant came in and indicated that both her knees were feeling better as the injections “definitely helped from the last visit.” He diagnosed bilateral knees with symptomatic degenerative joint disease-improved with cortisone injection. Dr. Wilcox advised that appellant was doing well and could go back to “full activities unrestricted.”

In a January 4, 2017 report, Dr. May noted that appellant was reexamined as appellant related that in the past 24 to 48 hours, she developed severe right knee pain and swelling. He advised that appellant continued working restricted duty, but was still delivering mail. Dr. May advised that it seemed to be worse with the recent onset of cold weather. He explained that there was no direct trauma to the right knee and she was status post total knee arthroplasty. Dr. May’s examination findings of the right knee included: an arthroplasty scar anteriorly; large effusion; generalized tenderness and restricted range of motion. He noted that gait was antalgic without ambulatory aids. Dr. May also x-rayed the right knee and advised that he could not find any loosening of the prosthetic portions of the knee replacement. He advised that he was going to restrict appellant further as to her standing, walking, and climbing. Dr. May also indicated that he would request authorization for consultation with an orthopedic specialist.

By decision dated January 10, 2017, OWCP denied modification of the August 2, 2016 hearing representative decision. It found the medical evidence of record was insufficient to establish disability for the period October 29, 2013 and continuing, causally related to her July 16, 2013 work injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.¹⁰ For each period of disability claimed, the employee has the burden of proof to establish that she was disabled for work as a result of the accepted employment injury.¹¹ 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.¹²

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.¹³ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁴ An employee who has a physical impairment causally related to his or her federal

⁹ *Supra* note 2.

¹⁰ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

¹¹ *See Amelia S. Jefferson*, *id.*

¹² *See Edward H. Horton*, 41 ECAB 301 (1989).

¹³ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

¹⁴ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

employment, but who nonetheless has the capacity to earn the wages that she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁵ 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 any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁶

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from October 29, 2013 and continuing causally related to her accepted July 16, 2013 employment injury.

In support of her claim, appellant submitted numerous reports from her treating physician, Dr. May in support of her claimed period of disability. However, Dr. May did not provide a rationalized opinion, explaining how or why appellant was totally disabled from work commencing October 29, 2013, causally related to her July 16, 2013 employment injury. For example, in a December 31, 2013 attending physician's report, he advised that the history of injury included that her right leg gave out and she fell hitting her right knee and right elbow. Dr. May noted that the period of disability ran from October 29, 2013 to March 31, 2014. In a January 29, 2014 attending physician's report, Dr. May explained that appellant's right lower extremity gave out, and she fell, hitting her right knee and right elbow. He advised the period of disability ran from October 29, 2013 to April 29, 2014. In an April 18, 2015 attending physician's report, Dr. May advised that the history of injury included that appellant's right leg gave out and she fell while working on her right knee and her right elbow on July 16, 2013. He advised that appellant was totally disabled from work from October 29, 2014. The Board finds that these reports from Dr. May conclude that appellant was totally disabled during the claimed period due to the July 16, 2013 employment injury. However, they fail to provide sufficient rationale explaining the causal relationship between the claimed disability and the accepted injury.¹⁷ The Board has found that medical opinions unsupported by rationale regarding the period of disability claimed are of little probative value.¹⁸ Thus, the reports of Dr. May are insufficient to establish the claim.

The record also contains a July 11, 2013 treatment note from a physician assistant. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and

¹⁵ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁶ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

¹⁸ *M.P.*, Docket No. 14-1289 (issued September 26, 2014); *F.T.*, Docket No. 09-0919 (issued December 7, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

social workers are not considered “physician[s]” as defined under FECA.¹⁹ Consequently, the physician assistant’s July 11, 2013 treatment notes are of no probative value and are insufficient to meet appellant’s burden of proof.

Other records, including August 12, 2013 treatment notes from Dr. Wilcox, a March 24, 2014 report from Dr. Mathis, and May 12, 2014 report from Dr. Gittins did not specifically address the dates of disability claimed or provide medical rationale explaining whether and why she was disabled from October 10, 2013 and continuing. As such, those reports are also insufficient to establish the claim.

As noted, appellant must submit reasoned medical evidence directly addressing the specific dates of disability for work for which she claims compensation.²⁰ She did not provide medical evidence containing a rationalized opinion supporting that she was totally disabled from work from October 29, 2013 and continuing due to her accepted conditions. Thus, the Board finds that she has not met her burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established total disability commencing October 29, 2013 causally related to her July 16, 2013 employment injury.

¹⁹ See 5 U.S.C. § 8101(2). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

²⁰ See *K.A.*, Docket No. 16-0592 (issued October 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2018
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