

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

C.K., Appellant	)	
	)	
and	)	<b>Docket No. 17-1853</b>
	)	<b>Issued: August 27, 2018</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Milwaukee, WI, Employer</b>	)	
	)	

*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:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 31, 2017 appellant, through counsel, filed a timely appeal from an August 4, 2017 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 over the merits of the claim.<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 record provided to the Board includes evidence received after OWCP issued its August 4, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ISSUE

The issue is whether appellant has met her burden of proof to establish intermittent periods of disability from January 20 to June 5, 2016 causally related to her accepted September 23, 2015 left knee strain.

## FACTUAL HISTORY

On September 23, 2015 appellant, then a 50-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she twisted her right knee after patting down a passenger.<sup>4</sup> She stopped work on the date of injury.

On September 24, 2015 Dr. Jeanmarie Duester, a family practitioner and occupational medicine specialist, evaluated appellant and released her to work with restrictions.<sup>5</sup> On October 8, 2015 she released appellant to full-duty work, with no restrictions.

By decision dated May 23, 2016, OWCP accepted left knee sprain of unspecified site.<sup>6</sup>

On June 3, 2016 appellant filed a recurrence of disability claim (Form CA-2a) alleging lost time from work and a worsening of her September 23, 2015 left knee injury commencing January 20, 2016. She returned to work on February 16, 2016. The employing establishment indicated that appellant worked approximately four months restriction-free from October 8, 2015. Appellant was then placed on light-duty status from February 16 through May 16, 2016.

On June 3, 2016 appellant filed claims for compensation (Form CA-7) from May 17, 2016 and continuing. She indicated that the employing establishment disapproved a light-duty assignment. The employing establishment indicated that it provided appellant multiple light/limited-duty assignments except when the evidence was insufficient to determine light-duty capabilities.<sup>7</sup> On June 6, 2016 it offered, and she accepted, a limited-duty assignment.

The record reflects that, on January 28, 2016, appellant sought treatment from Jason Szpak, a certified physician assistant. Mr. Szpak noted that she had a previous left knee arthroscopy in 2004 and did well until September 23, 2015, when she twisted the left knee during a pat-down at

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<sup>4</sup> In a May 17, 2016 statement, appellant explained that her left knee was injured, not the right knee as reported by the employing establishment.

<sup>5</sup> Dr. Duester provided an assessment of left knee strain. She reported that appellant had previous surgery to her knee and that September 23, 2015 x-rays were negative for an acute fracture, but positive for mild degenerative changes to the medial compartment and small suprapatellar joint effusion was noted.

<sup>6</sup> The present claim was assigned OWCP File No. xxxxxx698. Under OWCP File No. xxxxxx491, appellant claimed an injury to her left leg on April 15, 2016. OWCP accepted other and unspecified complications of medical care. Under OWCP File No. xxxxx515, appellant claimed that her right knee was aggravated by her left knee torn meniscus on June 2, 2016. OWCP accepted other and unspecified complications of medical care.

<sup>7</sup> The dates appellant used personal leave and leave without pay (LWOP) as a result of insufficient evidence to determine light-duty capabilities were 67.5 hours from February 3 through 15, 2016 and 112 hours from May 17 through June 5, 2016.

work. He provided an assessment of left knee pain following twisting injury at work with effusion; right knee pain with effusion, possibly compensatory; and right peroneal tendon pain, compensatory, work related. Appellant was placed on work restrictions of primarily seated work.<sup>8</sup>

A January 28, 2016 return to work note, by an unknown provider, indicated that appellant could return to work with restrictions on January 29, 2016. Diagnoses of left knee sprain, flare of right knee degenerative joint disease/possible re-tear of meniscus were provided.

In a February 15, 2016 report, Dr. Pifel, a Board-certified orthopedic surgeon, related examination and magnetic resonance imaging (MRI) scan findings of both knees. The left knee MRI scan showed moderate-to-severe degenerative changes, with suggestion of previous meniscectomy and questionable previous partial injury, mild, to the anterior cruciate ligament (ACL). An assessment of bilateral knee pain, left greater than right, with moderate degenerative changes in a patient with previous arthroscopies on both knees with new work-related injury on the left was provided. Dr. Pifel indicated that appellant had an exacerbation of her underlying condition.

Mr. Szpak continued to treat appellant and provide work restrictions. In March 15 and April 5, 2016 reports, he indicated that she had a new work-related injury on the left and likely compensatory pain on the right, which he opined was an exacerbation of her underlying condition.

In an April 18, 2016 report, Dr. Pifel noted that appellant was seen for a left knee injury which occurred at work on April 15, 2016, when she slid off her chair and twisted her left knee. An assessment of repeat left knee injury, work related, was provided. A repeat left knee MRI scan was ordered.

In an April 21, 2016 report, Dr. Pifel indicated that the left knee MRI scan showed changes consistent with full-thickness chondral defect, medial femoral condyle, and a tear in the medial meniscus. An assessment of left work-related aggravation of underlying arthritis, tear in the medial meniscus with a patient with fairly significant chondral disease was provided. In an April 21, 2016 duty status report (Form CA-17), Dr. Pifel indicated that appellant had work-related left knee aggravation of underlying arthritis, medial meniscus tear, and chondral disease due to injury. He indicated that she could return to work with restrictions.

In an April 29, 2016 attending physician's report (Form CA-20), Dr. Pifel indicated that on September 23, 2015 appellant twisted her left knee while patting down a passenger. He indicated that she had aggravation of underlying arthritis, medial meniscus tear, and chondral disease and compensatory pain on right knee and flare of osteoarthritis, which he opined was caused or aggravated by the September 23, 2015 employment activity. Dr. Pifel indicated that appellant could work with restrictions from April 20 to May 12, 2016.

In a May 12, 2016 report, Dr. Pifel provided an assessment of left knee work-related injury with underlying secondary osteoarthritis and medial meniscus tear, aggravated by work-related

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<sup>8</sup> It was reported that Dr. Eric Pifel, a Board-certified orthopedic surgeon, reviewed the chart. However, there is no indication that he signed the report.

incident. He indicated that appellant would continue on work restrictions. May 12, 2016 work restrictions from Mr. Szpak, PA-C were received.

In a June 15, 2016 development letter, OWCP noted that appellant stopped work on May 17, 2016 and was claiming compensation effective May 17, 2016 and continuing. Appellant was advised that the documentation received was insufficient to support her claim for compensation and that additional medical evidence was needed to establish disability from work during the entire period claimed. OWCP afforded her 30 days to submit the requested information.

In a June 2, 2016 letter, Dr. Pifel indicated that the original mechanism was the September 23, 2015 work injury when appellant twisted her left knee during a pat-down on a passenger. He indicated that her right knee flared up in the recovery of this and began to bother her significantly more than prior to her last surgery in 2010. Dr. Pifel noted that appellant had difficulty with combined medial meniscus tear with flare of underlying arthritic wear.

In a June 2, 2016 report, which Dr. Pifel signed on June 7, 2016, related that appellant had a left knee arthroscopy in 2004 and that she did well until a work injury on September 25, 2015, when she twisted her left knee during a pat-down of a passenger. Appellant did not progress despite conservative treatment. Dr. Pifel noted that the MRI scan revealed re-tear of the medial meniscus along with underlying degenerative changes. He further noted that appellant had re-aggravated the knee several times, first on January 28, 2016 and then on April 15, 2016. Dr. Pifel opined that her right knee underlying degenerative change had been exacerbated secondary to her compensation on the left. He provided an assessment of left knee medial meniscus tear/flare of osteoarthritis, work related; injuries on September 23, 2015 and January 28 and April 15, 2016; and flare of right knee osteoarthritis from compensation of the left knee, work related. Appellant was to remain on the same work restrictions. Dr. Pifel noted that she wanted to proceed with left knee arthroscopy for partial medial meniscectomy and chondroplasty.

By decision dated August 26, 2016, OWCP denied appellant's recurrence claim and claim for compensation from May 29, 2016 and continuing.<sup>9</sup> It found that there was no medical opinion from a physician regarding causal relationship between the accepted injury and the diagnosed conditions without an intervening injury or due to a preexisting condition. Thus, OWCP concluded that appellant had not established that she was disabled due to a material change/worsening of her accepted work-related condition.

On June 12, 2017 appellant, through counsel, requested reconsideration.

In a May 30, 2017 report, Dr. Neil Allen, a Board-certified internist and neurologist, reviewed appellant's medical records. He indicated that she suffered a left knee sprain/strain injury while on duty on September 23, 2016,<sup>10</sup> when she twisted to the right after performing a pat-down. Appellant returned to work on October 8, 2015, but her condition continued to worsen and on

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<sup>9</sup> The Board notes that the period of wage-loss compensation claimed is for 112 hours from May 17 through June 5, 2016.

<sup>10</sup> The year of the injury appears to be a typographical error.

June 3, 2016 she felt unable to return to work. Dr. Allen noted that Dr. Pifel, her treating physician, had documented a progression of arthritis and the effect on her loss of function. He opined that appellant's case should include exacerbation of unilateral primary osteoarthritis, left knee. Dr. Allen noted that she denied functional loss related the aforementioned condition(s) prior to the work-related trauma sustained on September 23, 2016 and that during the course of treatment of previous work-related injury it was discovered that she suffered from osteoarthritis of the left knee.

Dr. Allen indicated that the osteoarthritis developed overtime and became symptomatic on September 23, 2016 due to the maneuvering required to perform a pat-down. He quoted portions of The Merck Manual 14<sup>th</sup> Edition and an article published by Dr. David Felson to support his opinion that appellant had symptoms of osteoarthritis and possessed two of the three risk factors associated with osteoarthritis of the knee, two being occupationally related. Dr. Allen explained that the repetitive wear, more than what would be normally expected environmentally, combined with a maximal axial load with torsion occurring on September 23, 2016 resulted in the exacerbation of her underlying arthritic condition. He also opined that appellant should be compensated for her total disability from May 17, 2016 to the present. Dr. Allen concluded that her left knee osteoarthritis was directly caused and/or exacerbated by repetitive occupational trauma combined with acute trauma sustained on September 23, 2016 as described above and supported by scientific evidence in the literature, as cited above.

In a September 6, 2016 report, Dr. Pifel indicated that he had seen appellant since the beginning of 2016, after she sustained the September 2015 work injury when she twisted her left knee while doing a pat-down of a passenger. He noted that, during her recovery, the right side began to bother her more. Dr. Pifel noted that appellant had previous surgeries on both knees and that she had new symptoms, first on the left, and then on the right side as she began to compensate for the left. He noted that she was seen for consistent pain with her underlying arthritic condition of both knees. Dr. Pifel indicated that appellant had a repeat injury to the right knee in April 2016 which occurred at work. He opined that she had a work-related injury to both knees, which included aggravation of underlying arthritis and meniscus tear.

By decision dated August 4, 2017, OWCP denied modification of its prior decision. It found that the medical evidence from Dr. Pifel and Dr. Allen was of diminished probative value as they had not provided sufficient medical rationale explaining how the September 23, 2015 injury aggravated appellant's arthritis or meniscus tear supported by objective medical evidence and demonstrated with clinical findings that the accepted condition materially worsened/changed without intervening cause or due to her preexisting condition.

### **LEGAL PRECEDENT**

A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>11</sup>

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<sup>11</sup> 20 C.F.R. § 10.5(x).

Appellant has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence a causal relationship between his or her recurrence of disability and the employment injury.<sup>12</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>13</sup>

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 his or her disability and entitlement to compensation.<sup>14</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of intermittent disability from January 20 to June 5, 2016 causally related to her accepted September 23, 2015 employment injury.

The initial evidence surrounding appellant's alleged recurrence of January 20, 2016 indicates that she was being treated by Mr. Szpak, a certified physician assistant. However, the Board has previously explained that reports signed solely by a physician assistant are of no probative value as a physician assistant is not considered a physician as defined under FECA and therefore is not competent to provide a medical opinion.<sup>15</sup>

In a February 15, 2016 report, Dr. Pifel noted that appellant had a work-related injury of the left knee. He opined that she had an exacerbation of her underlying condition, and noted findings from a left knee MRI scan which showed moderate-to-severe degenerative changes, with suggestion of previous meniscectomy and questionable previous partial injury to the ACL. Dr. Pifel however offered no opinion that appellant's accepted left knee strain had spontaneously worsened, and that she was disabled due to a worsening of her accepted condition as of January 20, 2016.<sup>16</sup> His general opinion that she had an exacerbation of her underlying condition is insufficient to meet her burden of proof to establish total disability from work.<sup>17</sup>

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<sup>12</sup> *Carmen Gould*, 50 ECAB 504 (1999).

<sup>13</sup> *Mary A. Ceglia*, 55 ECAB 626 (2004).

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

<sup>15</sup> *See V.J.*, Docket No. 17-0358 (issued July 24, 2018); *see also David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

<sup>16</sup> *Supra* note 11.

<sup>17</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

In his April 18, 2016 report, Dr. Pifel related that appellant had a left knee injury at work on April 15, 2016 when she slipped off a chair. An assessment of repeat left knee work-related injury was provided. The April 15, 2016 injury represents an intervening injury. As previously noted, a recurrence of disability is a spontaneous change in an accepted condition, without intervening injury.<sup>18</sup>

In his report of April 21, 2016, Dr. Pifel provided an assessment of left-sided work-related aggravation of underlying arthritis and medial meniscus tear in a patient with significant chondral disease, but did he not address causation. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>19</sup> Dr. Pifel did not provide a medical explanation of how the accepted September 23, 2015 work injury caused or aggravated appellant's conditions or the effect, if any, the intervening injury of April 15, 2016 had on the diagnosed conditions, which now included a medial meniscus tear.<sup>20</sup> Similarly, in his April 29 and May 12, 2016 reports, he opined, without additional explanation or rationale, that her aggravation of underlying arthritis, medial meniscus tear and chondral disease and compensatory pain of the right knee and was caused or aggravated by the September 23, 2015 employment incident.<sup>21</sup> The need for rationale is particularly important where the record indicates that appellant had preexisting bilateral knee conditions and an intervening injury.<sup>22</sup>

In his June 2, 2016 report, Dr. Pifel reported that appellant had injuries of September 23, 2015, January 28, and April 15, 2016 and noted MRI scan findings. He provided an assessment of left knee medial meniscus tear/flare of osteoarthritis and work-related flare of right knee osteoarthritis from compensation of left knee and indicated that she could work with restrictions. However, Dr. Pifel's reports fail to establish a basis for the claimed recurrence or the wage-loss claim as he did not provide adequate medical rationale in support of his opinion on causal relationship. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion unsupported by medical rationale.<sup>23</sup> Dr. Pifel only briefly described the September 23, 2015 work injury. He did not explain the medical process through which it could have been competent to cause aggravation of the underlying arthritis and meniscus tear or to establish that appellant had work-related disability on or after May 17, 2016 due to the accepted condition. There is no review or discussion of the medical records prior to the September 23, 2015 work injury to substantiate that appellant's underlying condition changed due to the September 23, 2015 work injury. Dr. Pifel merely reported that she had new symptoms, first on the left, and then on the right side as she began to compensate for the left. While he also noted that appellant had intervening injuries to the left and right knees, he failed to discuss what

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<sup>18</sup> *Supra* note 11.

<sup>19</sup> *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1998).

<sup>20</sup> *See supra* note 17.

<sup>21</sup> *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

<sup>22</sup> *See J.D.*, Docket No. 16-0887 (issued November 4, 2016); *L.M.*, Docket No. 16-0143 (issued February 19, 2016).

<sup>23</sup> *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

impact, if any, those injuries had on the diagnosed conditions. The Board has held that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between a claimed condition and employment factors.<sup>24</sup> Dr. Pifel did not adequately consider whether appellant's continuing complaints were due to the natural progression of her underlying arthritic condition or intervening injuries to the left knee.<sup>25</sup> His reports are, therefore, of limited probative value.

Dr. Allen described the September 23, 2015 work injury and noted that appellant's condition continued to worsen after she returned to work in October 2015. He noted that the medical records revealed an exacerbation of her underlying arthritic condition. Dr. Allen opined that the repetitive wear combined with the maximal axial load with torsion occurring on September 23, 2015 caused and/or resulted in the exacerbation of appellant's underlying arthritic condition. He also opined that she should be compensated for her total disability from May 17, 2016. However, Dr. Allen has not provided sufficient medical rationale to support that appellant was disabled or further disabled due to a material change or worsening of her accepted work-related condition without intervening cause or due to her preexisting arthritic condition. Medical opinion evidence should reflect a correct history and offer a medically-sound explanation of how the specific employment incident physiologically caused injury.<sup>26</sup> Dr. Allen indicated that the osteoarthritis became symptomatic on September 23, 2015 due to the maneuvering required to perform a pat-down. However, he did not explain the medical process through which the September 23, 2015 injury could have been competent to cause aggravation of the underlying arthritis or to establish that appellant had work-related disability on or after May 17, 2016 due to the accepted condition. As such, Dr. Allen's report is of limited probative value as it contains a conclusion unsupported by medical rationale.<sup>27</sup>

On appeal counsel contends that OWCP's decision is contrary to fact and law. As explained above, however, appellant has not submitted sufficient medical evidence to establish her recurrence claim.

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 has not established intermittent recurrence of disability from January 20 to June 5, 2016 causally related to her accepted September 23, 2015 left knee strain.

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<sup>24</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>25</sup> *Michael Stockert*, 39 ECAB 1186-88 (1988).

<sup>26</sup> *M.A.*, Docket No. 17-0122 (issued May 2, 2017).

<sup>27</sup> *Supra* note 23.



**ORDER**

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

Issued: August 27, 2018  
Washington, DC

Christopher J. Godfrey, 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